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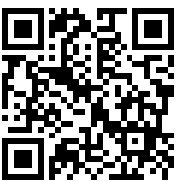

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AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

BAGOT *v.* EASTON.

[1877 B. 11.]

C. A.
1877
V.-C. B.
July 5.
C. A.
Nov. 2.

Practice—Alternative Relief—Inconsistent Allegations—Rules of Court, 1875, *Order* XVII., *rr.* 1, 8—*Order* XXVII., *r.* 1—*Order* XXXVI., *r.* 6.

A Plaintiff, by his statement of claim, claimed to have an agreement for a partnership with the Defendant in a land speculation cancelled on the ground that he had been induced to enter into it by the misrepresentation of the Defendant, and in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement might be dissolved and the accounts taken, and the Defendant restrained from interfering with the management of the works in violation of the agreement.

The Defendant moved for an order for the Plaintiff to amend his statement of claim by confining it to one of the alternative claims:—

Held (reversing the decision of *Bacon*, V.C.), that there was no inconsistency in the alternative claims, or in the allegations in support of them; and the motion was refused.

Statement.

THE case made by the statement of claim in this case was in substance that the Defendant *Easton*, who formerly practised as a

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solicitor, represented, in 1875, to the Plaintiff's cousin, *Fitzroy Bagot*, a youth of twenty-two and without means, that he was the owner of an estate called the *Quirigua* estate in *Guatemala*, which only required development to be exceedingly valuable. *Easton* proposed to *Fitzroy Bagot* that he should, either alone or with a friend, go out and manage and develop the estate for a few years as a joint adventure with him, and should afterwards continue the adventure in partnership with him, a sum of £4000 being required to be brought in.

Fitzroy Bagot applied to the Plaintiff to join him in the enterprise. *Easton* represented to the Plaintiff that the adventure would be a fortune to any one who would take it up, and that he had been induced from motives of friendship to offer *Fitzroy Bagot* a share in it, and would include the Plaintiff in the adventure if he would find the requisite capital, which *Easton* agreed to reduce from the £4000 first mentioned to £2400.

The Plaintiff agreed to bring in £2400, and consented to the proposed arrangement, according to which he and his cousin were to become partners with *Easton* in the adventure on certain terms, and at the end of three years, if they wished to proceed further with the matter, a partnership deed was to be executed, and the adventure continued for a term of twenty-one years.

The Defendant *Easton*, in order, as he said, to save the Plaintiff and his cousin from all expense, offered himself to prepare the necessary agreement and a draft of the partnership deed to be executed at the end of the three years for carrying out this arrangement, and in October, 1875, he called hurriedly upon the Plaintiff with the drafts for his immediate perusal. The Plaintiff, who was not conversant with legal documents, perused them hastily, and, so far as he understood them, he believed that they gave effect to the terms agreed on.

One part of the arrangement was that the Plaintiff and his cousin should go out to *Guatemala*. On the morning of the day that the steamer sailed the Plaintiff executed, without any further consideration or advice, the agreement which had been brought down the night before by the Defendant engrossed for his signature, and which contained in a schedule the draft of the contemplated partnership deed.

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The agreement differed materially from the terms above stated. In particular, it contained no stipulation for the adoption of the scheduled draft or the continuance of the partnership beyond three years, unless with the consent of *Easton*. The agreement contained a clause for referring all matters in dispute to arbitration, but that clause was not set out in the statement of claim.

The Plaintiff and his cousin went out to *Guatemala*, and through their exertions the estate, which was in great confusion, had materially increased in value. *Easton* had recently expressed himself dissatisfied with the progress of the enterprise, and "had declared his intention of not continuing the enterprise any longer;" and further, in direct violation and breach of the agreement, and without the knowledge or consent of the Plaintiff and his cousin, had sent out a power of attorney empowering one *Potts* to stop the working of the estate. The Defendant also declined to honour drafts drawn according to the terms of the agreement, and, as the statement of claim averred, refused altogether to continue the enterprise according to the agreement, which the Plaintiff had in all respects complied with on his part.

The statement of claim also averred that the Plaintiff was induced to enter into the agreement by the representations of *Easton* that the enterprise would be very beneficial for the Plaintiff, and that he and his cousin were to be partners in the adventure, not only for three years, but for the further term of twenty-one years, and that he executed the agreement with the intention and in the belief that the rights of partners would be thereby secured to his cousin and himself.

Under these circumstances the Plaintiff claimed by his statement of claim a declaration that he was induced to execute the agreement and to give a security by which *Easton* was enabled to obtain payment of the £2400 by the misrepresentation of *Easton*, and in ignorance of the true effect of such agreement, a rescission of the agreement and repayment of the £2400, and a declaration that the Plaintiff was entitled to a lien on all the assets of the adventure for the £2400, or, in the alternative, of a dissolution of the partnership between the Plaintiff and *Easton*, and to have the partnership accounts taken and assets realized and distributed;

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and in either case to have a receiver and manager appointed of the estate, and an injunction to restrain *Easton* from receiving the remittances and from interfering with the management or stopping the works; and damages in respect of the matters complained of.

On the 25th of June an injunction was obtained by the Plaintiff.

On the 5th of July the Defendant *Easton* moved, before Vice-Chancellor *Bacon*, for an order confining the Plaintiff's action to one or other of the causes of action in respect of which by his statement of claim he sought relief; and in case the cause of action based upon alleged breaches of the agreement were not excluded, then that all proceedings sought to be taken thereunder or upon the footing of that agreement, being valid (other than proceedings under the order for a receiver and manager of the 28th of June, 1877), might be stayed, and that all matters in difference between the parties thereto might be referred to arbitration, as provided by the said agreement; and that the Court might direct all necessary amendments of the statement of claim consequent upon its order; and that in any case the Plaintiff might be ordered to amend his statement of claim so that it should state distinctly and separately, and so as not to embarrass the Defendant in the trial of the action, the several facts upon which the Defendant meant to rely in respect of each cause of action not excluded; and in particular, that every alleged misrepresentation by the Defendant, and every fact upon which the Plaintiff meant to rely in support of his cause of action for setting aside such agreement, should (in case that cause of action were not excluded) be stated in the statement of claim separately and distinctly from any other cause of complaint therein alleged.

Argument.

Sir *H. Jackson*, Q.C., and *H. Fellows*, in support of the motion:—

Under the old practice the Defendant could have demurred on the ground that inconsistent and alternative relief was prayed: *Rawlings* v. *Lambert* (1); *Cawley* v. *Poole* (2); *Kendall* v.

(1) 1 J. & H. 458. (2) 1 H. & M. 50.

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Beckett (1); *Ernest* v. *Vivian* (2); *Cruickshank* v. *M'Vicar* (3). And under the new practice, although the objection for multifariousness cannot be taken by demurrer, the Plaintiff may apply for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding, and power is given to the Court to order any of such causes of action to be excluded: Rules of Court, 1875, Order XVII., rules 8, 9; and by Order XXVII., rule 1, to order to be struck out or amended any matter in the statement of claim "which may tend to prejudice, embarrass, or delay the fair trial of the action."

The Plaintiff is clearly hovering between two inconsistent states of facts, for up to a certain point his statement of claim proceeds on the theory that the agreement is binding on all parties and has been broken by the Defendant, and he then turns round and intimates a case for rescinding, or at least rectifying, the agreement. The Defendant is entitled to know which of the two cases he has to meet. If the Plaintiff insists upon his right to rescind the agreement, that is an issue which the Defendant will be prepared to meet. If, on the other hand, the Plaintiff admits the validity of the agreement—and it is impossible from the averments in the statement of claim to tell whether he does so or not—then the Defendant is entitled under the arbitration clause in the deed to have all matters in dispute referred. We ask that the Plaintiff may be put on terms to elect on which ground of relief he will go so as not to embarrass a fair trial of the action; and the objection to the statement of claim has been properly raised by motion to amend the pleadings: *Cox* v. *Barker* (4); *Child* v. *Stenning* (5).

Hemming, Q.C., and *Buckley*, for the Plaintiff:—

Even under the old practice such a bill would not have been demurrable, as alternative relief might be claimed so long as there were no inconsistent allegations of fact: *Rawlings* v. *Lambert* (6); *Bennet* v. *Vade* (7). But this is now immaterial, as under the

(1) 2 Russ. & My. 88.
(2) 33 L. J. (Ch.) 513.
(3) 8 Beav. 106.
(4) 3 Ch. D. 359.
(5) 5 Ch. D. 695.
(6) 1 J. & H. 458.
(7) 2 Atk. 324.

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new practice a wide discretion over the pleadings is given to the Court; and the *Judicature Act*, in order to prevent multiplicity of actions (sect. 25 (7)), and to include and dispose of all questions between the parties once for all in the same action, expressly contemplates that a statement of claim may be framed in an alternative form.

[BACON, V.C.:—Within proper bounds.]

There is nothing inconsistent or embarrassing in the statement of claim. We state certain facts from which we ask the Court to infer that the agreements are void, and ought to be set aside on the ground of misrepresentation. That is the relief we prefer. But as the Court may not draw from the facts the same inference that we do, or we may be prevented by laches from getting that relief, then we ask that the agreement, if it is to stand, shall be fairly carried out by the Defendant, and that our rights under it may be ascertained. There is no antagonism of facts. By alleging that we were induced in the first instance by the misrepresentation of the Defendant to enter into a contract, we are not precluded from saying that the contract, if it should be held to be binding on us, has been broken by the Defendant, and that we are entitled to have our rights under it ascertained and determined as against the Defendant. A deed voidable on the ground of fraud remains in force until it has been avoided: *Davies* v. *Otty* (1); *Thomson* v. *Eastwood* (2). If one aspect of the case fails, we are entitled to relief on the other, which is different but not inconsistent, and we simply ask for that alternative relief to which we are entitled under the *Judicature Act* and the Rules of Court.

Judgment, V.-C. B.

BACON, V.C.:—

Under the old practice it can hardly be doubted that the Defendant's objection would have been sustained on demurrer. Then the *Judicature Act* permits different causes of action to be joined together in the same statement of claim. In this case there is no joinder of different causes of action, but the statement of claim discloses two totally inconsistent states of facts, and two totally different forms of relief, upon totally inconsistent grounds, are

(1) 2 D. J. & S. 238. (2) 2 App. Cas. 215.

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suggested and prayed. This would make it necessary to put one set of facts on trial first. But in the whole course of the argument on behalf of the Plaintiff this fact has not been touched upon, that if the partnership agreement is to have effect given to it it contains a clause under which all questions in dispute will have to be referred to arbitration. If the record remains in its present state the Defendant cannot know what case he has to meet. Where is the hardship upon the Plaintiff? He imputes fraud and misrepresentation to the Defendant, and undertakes to prove that the agreement ought to be rescinded. If that is his case, why does not he rely upon it and so rest his case? He cannot be prejudiced by so doing, because if his action is dismissed his partnership is established, and he can then go on his other line of action for an account. The statement of claim must therefore be amended by confining the Plaintiff's claim to one or other of the causes of action in respect of which he seeks relief.

Judgment, V.-C. B.

C. A.

The Plaintiff appealed from this decision. The appeal was heard on the 2nd of November, 1877.

Hemming, Q.C., and *Buckley*, for the Appellant.

They were stopped by the Court.

Sir *H. Jackson*, Q.C., and *H. Fellows*, for the Defendant *Easton*.

The same authorities were referred to as in the hearing before the Vice-Chancellor; and also *Honduras and Inter-Oceanic Railway Company* v. *Tucker* (1).

Judgment, C. A. Lord Cairns, L.C.

LORD CAIRNS, L.C.:—

The application by the Defendant to the Vice-Chancellor was for an order to oblige the Plaintiff to amend his statement of claim, and confine it to one of the two alternatives on which he asks relief.

Independently of the *Judicature Act*, I think this is exactly the kind of case in which, so far as the pleadings are concerned, alternative relief may be asked for. In both alternatives the

(1) 2 Ex. D. 301.

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C. A. 1877 BAGOT v. EASTON.

Judgment, C. A. Lord Cairns, L.C.

question arises between the same parties and mainly upon the same facts. The Plaintiff tells a story, which may or not be supported by the evidence; and he asks, upon certain facts alleged, that a particular agreement for partnership may be rescinded on the ground of fraud, or, if the Court shall not be of opinion that the facts justify such a decree, that upon certain additional facts alleged he may be held entitled to a dissolution of the partnership on the ground of the Defendant's conduct.

I am at a loss to conceive how there is anything inconsistent in point of pleading in joining these claims together. Before the *Judicature Act* I think this form of claim would have been allowed. But the *Judicature Act* has enlarged the liberty of the Plaintiff in claiming relief, for it is expressly provided that, subject to certain regulations, alternative relief may be asked and several causes of action may be joined in the same statement of claim.

The only objection to this claim that could be urged is that there might be some inconvenience and expense to the Defendant caused by the prayer for alternative relief, because he might have to prepare evidence to meet a double case at the trial. But looking at the claim before us, I doubt whether there will be any great inconvenience. The counsel for the Defendant contends that the claim in the second alternative is met by the arbitration clause. I cannot say how that may be, but let it be assumed that there would be this inconvenience arising out of the double claim, that is met by the 1st rule of Order XVII. If the Defendant can shew to the Court that it will be more convenient to try one issue before the other he can apply under that rule, and one issue can be entirely disposed of before the other is approached. But that is not the present application. It is an application, as a matter of pleading, contrary, as I think, to the practice both before and since the *Judicature Act*, to order the Plaintiff to strike out one or other of the two claims. I think the application ought not to have been granted, and that the appeal must succeed.

JAMES, BAGGALLAY, and THESIGER, L.JJ., concurred.

Solicitors: *Lucas & Coe; Cookson, Wainwright, & Pennington.*

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CLARK *v.* GIRDWOOD.

C. A.
1877
V.-C. M.
April 26, 30; *May* 1, 2.
C. A.
Nov. 23, 24.

[1875 C. 37.]

Marriage Settlement—Rectification—Improper Limitations—Husband acting as Wife's Agent—Costs against a Solicitor.

The Plaintiff, a widow with children, being possessed of property left by her first husband, married, and marriage articles were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband and the solicitor who prepared the settlement:—

Held, by the Vice-Chancellor, that upon the evidence, the limitations were contrary to the intention of the Plaintiff, and that the husband, having undertaken as agent for the wife to have a settlement prepared, was bound to have such a contract prepared as the Court would sanction, and such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement.

The husband, and the solicitor who prepared the settlement (who in the view of the Vice-Chancellor had failed in his professional duty, and had by his neglect and misconduct caused the litigation), were ordered to pay the costs of the suit:—

Held, on appeal by the solicitor, that as he had not been guilty of participation in a fraud, but at most only of a blunder for which the remedy was an action for professional negligence, there was no jurisdiction to order him to pay the costs of the suit.

Statement.

THE original bill was filed on the 30th of January, 1875, for the purpose of having the trusts of certain articles of agreement for a settlement made on the marriage of the Plaintiff, *Jane Adelaide Elizabeth Clark*, with the Defendant, *Arthur Turner Clark*, carried into execution under the direction of the Court.

By the articles of agreement, which were dated the 6th of November, 1872, and made between *Arthur Turner Clark*, the Plaintiff, Mrs. *Clark*, then Mrs. *George*, and two trustees, *John Maw Darton* and *Finlay Thomas Girdwood*, after reciting that *Clark* was possessed of certain policies of assurance effected on his life in *America*, and of certain freehold properties situate in *Virginia* and *Missouri* in the *United States*, and that Mrs. *Clark* was possessed of or entitled under the will and codicils of her late husband, *James Gilbert George*, or otherwise, to certain household furniture and other estate and effects, and that *Clark* had four children and

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C. A. 1877 — CLARK v. GIRDWOOD. — Statement.

Mrs. *Clark* had five children; it was thereby agreed that the said several properties should be conveyed and assigned to the trustees by a proper deed of settlement, upon trust after the marriage to pay the income thereof to "the said *A. T. Clark* for life, and after his death, or the happening of the events hereinafter provided," to Mrs. *Clark* during her life, for her separate use, and after her decease, upon trust to pay the income to *Clark* for his life, but if he became bankrupt or insolvent, or assigned, charged, or otherwise disposed of the income, then the trust declared in his favour should wholly cease, and after the determination of those trusts the trustees were to divide the corpus or principal of the said real and personal estate among all the children of Mr. and Mrs. *Clark* then living or thereafter to be born who should attain the age of twenty-one or marry, absolutely in equal shares. And it was declared that the settlement should contain the usual clauses for maintenance and education of children, with power to the trustees to sell the trust estate or any part thereof; and further, that *F. T. Girdwood*, or any future trustee, being a solicitor, should be entitled to charge the trust estate for any business done and performed, whether strictly professional or not, in relation thereto; and lastly, that the settlement, in case of question, should be settled by the junior conveyancing counsel for the time being of the Court of Chancery.

Girdwood had been repeatedly applied to for a copy of the settlement, and had not produced it.

After the bill was filed the usual order was made for the Defendant *Girdwood* to file an affidavit of documents, but he failed to make such affidavit within the time limited, and the same was not in fact filed until an attachment had been issued against him and lodged with the sheriff, and he did not comply with the directions of the order to deposit the documents with the Clerk of Records and Writs until a second attachment was upon the point of being issued. At length, upon the documents being deposited and inspected, the Plaintiff became aware that the first life estate in the property was limited to *Clark*.

The bill was then amended, and it prayed, in addition to the relief originally asked, that the Plaintiff might be declared entitled for her life, for her separate use, to the whole of the property, estate, and effects comprised in the articles of the 6th of November, 1872, and thereby settled on her part, as also to the income of all

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other property, if any, to which she was entitled under the trusts of her settlement made upon her former marriage or the will and codicils of her first husband; and that such articles, if necessary, should be rectified and made conformable with the contract between the parties.

Statement.

The facts proved sufficiently appear from the judgment of the Vice-Chancellor.

The case came on for hearing before Vice-Chancellor *Malins* on the 26th of April, 1877.

Argument.

Higgins, Q.C., and *Ingle Joyce*, for the Plaintiff:—

We submit that the Plaintiff is entitled to have the whole of her own property settled upon her for her separate use, and that a proper settlement should now be executed for the purpose of carrying out that object. She could never have intended to give her sanction to such a settlement as this. It seems she understood that all her property was already settled upon herself, except certain furniture and effects of that nature. As she was entirely unprotected and had no legal adviser, it was unjustifiable on the part of her husband to give instructions for such a settlement, and for any solicitor to prepare it without directions from the lady herself. The solicitor, who prepared the document upon no instructions but those of the husband, ought to pay the costs of the suit, which was rendered necessary entirely through his conduct: *Baker* v. *Loader* (1).

As the husband alone gave instructions it is the same thing as if he had prepared the settlement, which brings the case within *Corley* v. *Lord Stafford* (2), where the deed was rectified because it was not a proper settlement according to the rules of the Court. In *Cogan* v. *Duffield* (3) a settlement was rectified upon a bill filed on behalf of the wife, though it was argued that there could be no rectification of a settlement except upon a mistake common to both parties. The same principle was acted upon in *Cooke* v. *Lamotte* (4), *Rhodes* v. *Bate* (5), and *Cobbett* v. *Brock* (6), where deeds were reformed on the ground of misrepresentation or concealment of facts.

(1) Law Rep. 16 Eq. 49.
(2) 1 De G. & J. 238.
(3) Law Rep. 20 Eq. 789; 2 Ch. D. 44.
(4) 15 Beav. 234.
(5) Law Rep. 1 Ch. 252.
(6) 20 Beav. 524.

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C. A. 1877 CLARK v. GIRDWOOD. Argument.

Glasse, Q.C., and *Bathurst*, for the Defendant *Clark*:—

The claim made by this bill is that the document may be rectified and made conformable to the intention of one of the parties. The Plaintiff alleges her intention to have been that she was to have the first life estate in the property, but that is denied by the Defendant, who, on the contrary, alleges that it was by the express wish of the Plaintiff that he gave instructions for the property to be settled upon himself in the first instance. The document must be considered to carry out the intention of both parties, for it was read over to the Plaintiff, and we have the evidence of *Girdwood* that she well understood the effect of it. But if not, the Court has no power to rectify it, except on the ground that the alleged error was common to both parties: *Sells* v. *Sells* (1), *Mortimer* v. *Shortall* (2), *Rooke* v. *Lord Kensington* (3). In the case of a contract in consideration of marriage the Court cannot restore the parties to the position they before occupied, but under special circumstances a deed of separation may be set aside, as in *Evans* v. *Carrington* (4). This principle was also acted upon in *Earl of Bradford* v. *Earl of Romney* (5). A deed may be set aside on the ground of fraud, but it cannot be rectified unless upon a common misunderstanding by both parties: *Fowler* v. *Fowler* (6). In the case of a voluntary deed the Court acts on entirely different principles, as is shewn by *Cooke* v. *Lamotte* (7). There was a confidential relationship between the parties, and the Court will not undo a benefit conferred upon one of the parties unless there be *mala fides*: *Rhodes* v. *Bate* (8).

The case of *Corley* v. *Lord Stafford* (9) does not apply, because there the barrister, who was the intended husband, prepared the settlement himself. There was no *mala fides* on the part of Mr. *Clark*. All he did was to have a settlement prepared in order to protect the Plaintiff against any liabilities which he might himself incur. This was a careful and proper act on his part.

Cracknall, for the Defendant *Girdwood*.

(1) 1 Dr. & Sm. 42.
(2) 2 D. & War. 363.
(3) 2 K. & J. 753, 764.
(4) 1 J. & H. 598.
(5) 30 Beav. 431.
(6) 4 De G. & J. 250.
(7) 15 Beav. 234.
(8) Law Rep. 1 Ch. 252.
(9) 1 De G. & J. 238.

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Judgment,
V.-C. M.

MALINS, V.C.:—

The transactions in this suit are of a lamentable description, and such as no Judge can look at without the greatest regret. It seems that Mr. *George*, a solicitor of reputation, who resided at *Monmouth*, died in December, 1871, leaving a widow, the Plaintiff in this suit, and seven children, and the property left by the testator for the benefit of his widow and children amounted to between £500 and £600 a year, and this property included a residence called *Newton Lodge*, where the Plaintiff was living happily with her children, but in the month of September, 1872, when her husband had been dead only nine months, some infatuation possessed her that she must have another husband, and she then had recourse to an advertisement in a newspaper by which she described her personal attractions and her property in highly advantageous terms. She was then thirty-nine years of age. This advertisement attracted the attention of Mr. *Arthur Turner Clark*, the Defendant, who was a widower with four children, and his history is thus described: He had been engaged in mercantile pursuits up to the year 1862, when he embarked in blockade-running during the American war, and in that year he went to *America*, as it was said, to protect his interests, and there he remained till June, 1872, when he returned to *England*. It is clear from the evidence that when he went to *America* he was in embarrassed circumstances, and it is equally clear that when he returned his circumstances were still embarrassed, since he was unable to pay the various creditors who applied to him for payment of their debts. At this time I think it is evident that he had not sufficient means for the support of himself and his children, and when he answered the Plaintiff's advertisement in November, 1872, he no doubt supposed that a marriage with a lady of her means would be of material assistance to him. The answer to the advertisement brought about an interview, and a great intimacy followed between the Plaintiff and Defendant. The lady seems to have been under an extraordinary infatuation, because she then knew nothing about the Defendant; he might have been a pauper or a swindler, for what she knew, and yet she did her utmost to prevent her brothers from making any inquiries respecting him, and she allowed the Defendant himself

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to write to her brothers, and even threaten legal proceedings against them if they continued those inquiries. The brothers of this lady appear to me to have acted most properly in the matter, and it is a pity the law did not enable them to prevent her from committing this act of folly. However she chose to do so.

On the 4th of November, 1872, she arrived in *London*, and the marriage was arranged to take place on the 6th, and it was not till the previous evening, about seven o'clock, that the Defendant took any steps for the preparation of a settlement. He then called upon Mr. *Girdwood*, a solicitor, whose offices were in *Verulam Buildings*, to whom he was introduced by his friend Mr. *Darton*. At this time the lady was in apartments in *Keppell Street, Russell Square*. She had no one with her, not even a servant, and she had no person whatever to protect her or to look after her interests. The Defendant took upon himself the duty of having a marriage settlement prepared, and he gave instructions for the settlement to Mr. *Girdwood*, and he having received those instructions, which were not written down, proceeded to prepare the contract. Mr. *Girdwood*, in his answer, states that he acted on behalf of the Plaintiff as well as her intended husband, but in his evidence taken in Court he said that this statement was not correct, and that he only acted on behalf of the Defendant. The document as at first prepared could not be found fault with, because it gave to the lady the first life estate for her separate use in her own property, and it gave to the husband such property as he had for life, with remainder to his wife.

From the evidence given by Mrs. *Clark*, and I see no reason to disbelieve her, it appears she was told by Mr. *Clark* that he had large property in *America*, that his property was much larger than hers, but it now turns out that all this property was imaginary. He told her, also, that he had certain policies of insurance, but Mr. *Clark* admits that the policies were of no value, as they were merely agency policies, that is, paid for by agencies; and I do not believe that he really had any property whatever, but, on the contrary, I am satisfied that he was deeply in debt, and in a complete state of insolvency.

Now, under these circumstances, looking at the position of the parties on the 5th of November, what ought to have been done?

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Considering that this man had nothing to settle, and the lady had property and had seven children to support, and that her property was left to her by her former husband for the support of herself and her children, there can be no doubt that it was the duty of Mr. *Clark*, and the imperative duty of Mr. *Girdwood*, to see that this lady had her own property secured to her for her separate use. That is what ought to have been done, but by the interlineation inserted by Mr. *Girdwood*, the first life estate in this lady's property was given to Mr. *Clark*. Mr. *Girdwood* says he made the interlineation before the execution of the settlement, and I am willing to believe that he did so, but I think he entirely failed in his duty in not calling the attention of the parties to the fact of that interlineation, and to the result which it would introduce. The extraordinary thing is, that a solicitor should receive instructions from a person he had never seen before to prepare a settlement and deprive the intended wife and her seven children of this property without having any communication with her upon the subject. He might have called upon her as she was living within ten minutes' walk of his chambers, and might have shewn her a draft of the document, but instead of this he thinks proper to have the settlement engrossed, and to take it to her for signature on the morning of the 6th of November, an hour only before the marriage was to take place. He then sees her for the first time, and he reads the document over to her. He says she understood the meaning of it; but I am satisfied that she had no notion of what the effect of it was. It could not possibly have been considered by her, because the recital that she had five children only could not have passed unnoticed by her when she had in fact seven children. It proves to me that her mind was so occupied about the approaching marriage ceremony that she was not capable of understanding the terms of the document. It does not rest upon conjecture, because I have the evidence of the lady, who believed everything that was told by Mr. *Clark*. She heard the settlement read under the influence of the representations made to her by him. She said in her evidence that she had a conversation with him the evening before the marriage took place, when he said he had made a settlement, and had settled her property on her. With that impression on her mind she took it

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for granted that the effect of the document was to settle her property on herself. And after the document was signed Mr. *Clark* said: "You see I have done what is right; I have left you all." He therefore meant that he had not taken anything away from her, and that the marriage would leave her where she was as to property. Then she stated she had no idea she was parting with her property; she did not understand that Mr. *Clark* was to be the owner of her property.

I find the result is that this lady has led a life of embarrassment and distress ever since her marriage. Having no difficulties of her own she has been overwhelmed by the embarrassments of Mr. *Clark*. It is an extraordinary thing that Mr. *Girdwood* did not think it necessary that the Plaintiff should be represented while preparing this settlement, and did not even think it necessary she should have a trustee—for Mr. *Darton*, the husband's friend, and Mr. *Girdwood*, the husband's solicitor, were the two trustees.

Now, what are the principles applicable to such a transaction? It is plain from the evidence that the husband undertook the duty of preparing a proper settlement, and a proper settlement is one that is proper having regard to all surrounding circumstances. It is said the instructions to Mr. *Girdwood* were to follow the form of the settlement made on the occasion of the first marriage with Mr. *George*. Now it happens that with regard to the settlement of Mr. *George's* property, the husband had the first life estate, with remainder to his wife by way of jointure, but that arose from the fact that the property belonged to the husband, and he therefore was properly made the first tenant for life, and that was not done with reference to the wife's property. Following that example, Mrs. *Clark* ought to have been given the first life estate in her property. Therefore, there was a total miscarriage by Mr. *Girdwood* in not making the settlor, whose property it was, first tenant for life. Did any one ever hear of a widow with seven children marrying a man with no property, and yet giving the whole of her property to him, and by that means pauperising herself? Because the effect of this settlement is to give the husband the first estate for life, and she had not a penny left. It is true there is a clause carrying the property over in case of insolvency,

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or bankruptcy, or assignment; but he might have been in a state of difficulty without being bankrupt or making an assignment, and the woman might have been in the position of not being able to obtain £5 for herself. That was a settlement which the circumstances could not justify. But it is very remarkable that as this lady understood all the property was to be settled on herself, and as she thought it was so settled, it now turns out from the evidence of Mr. *Girdwood* that that was his understanding also, for he says Mr. *Clark* told him the bulk of the lady's property was already settled, and that the rest of the property he wished to have protected against his transactions in *America*.

Mr. *Clark* told him that everything was settled upon the lady except the household furniture and effects; and he thought she took nothing else under the will. He did not think, therefore, that he was giving the husband a life estate in any land the lady might have; so, although he used the word "estate," it is plain he did not think that that extended to any interest in land. I have, therefore, the evidence of the lady that the Defendant intended she should retain all her property, and I have the representation of the solicitor, the agent and the only solicitor engaged, that that was the intention—the husband was not to have any interest in her property because it was already settled.

Therefore, on the terms of the contract, I am bound to come to the conclusion that the first life estate in this property ought to be in the wife. Assuming that, then comes into operation the rule of this Court. Cases were cited by Mr. *Glasse*, with most of which I entirely agree, that where this Court corrects a settlement it must be because it is framed in a manner contrary to the intention of all parties. He cited *Sells* v. *Sells* (1), where the question was whether the future property of the husband was to be included. The wife's advisers understood it was; the husband's advisers did not so understand it. Therefore, as there was not a contract on both sides that the property of the husband should be included, that falls under the rule that you cannot correct a settlement where the intention of one but not the intention of the other party is shewn. I have had cited to me the cases of *Rooke* v.

(1) 1 Dr. & Sm. 42.

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Lord Kensington (1), *Earl of Bradford* v. *Earl of Romney* (2), and *Fowler* v. *Fowler* (3), and they all proceed upon the same principle. In this case, however, I think Mr. *Higgins* is right in saying that the remarkable case of *Corley* v. *Lord Stafford* (4) is the one that entirely governs this. There the gentleman, who was a barrister, had been very many years on terms of great intimacy with the lady whom he was about to marry. She was eighty years of age, and he was twenty-four years younger. He undertook to prepare the marriage settlement, and accordingly he did prepare it, but he prepared it in a manner in which it ought not to have been prepared, giving himself a much greater interest than he ought to have had, or than it was the intention of the lady he should have. The point of the decision is that inasmuch as he undertook the duty of preparing the settlement, it was his duty to prepare such a settlement as a conveyancer would have approved, or the Court would have directed. Therefore if he undertook to do this duty as between himself and his intended wife, it was his duty to do it properly, and he could not do so unless he dealt with her property according to the rules of the Court. Now, therefore, in this case the Plaintiff, as I have pointed out, up to the hour of the marriage having had no settlement except that which her intended husband had undertaken to have prepared, he undertaking that duty, undertook to have a proper settlement prepared; and a proper settlement such as is here defined, which a conveyancer instructed to draw it would have drawn, and which this Court, if applied to, would have approved under the circumstances, would have undoubtedly limited every part of this lady's property to her own separate use for life without power of anticipation as against the husband. That, and that alone, was the settlement which the law would justify him in making. In *Corley* v. *Lord Stafford*, the husband's was the hand which prepared the settlement, but it would not have made the slightest difference if he had asked his solicitor to prepare it, because the fact of its being done for him would make it the same as his doing it himself, and although in this case Mr. *Clark* did not with his own hand prepare the settlement, he employed his

(1) 2 K. & J. 753.
(2) 30 Beav. 431.
(3) 4 De G. & J. 250.
(4) 1 De G. & J. 238.

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own agent and solicitor to do it, and he is as much answerable for the contents as Mr. *Corley* was for that which he did with his own hand. From the evidence of the lady, and from the evidence of the solicitor himself, it would appear that the property was intended to be settled upon the Plaintiff. Mrs. *Clark* says she was told that all her property was secured to herself, and I am myself satisfied that she was under that impression when the settlement was read to her on the morning of the marriage. If the contract really was what I believe it to have been, then immediately that Mr. *Clark* was applied to to correct it, by making Mrs. *Clark* the first tenant for life of everything, that request ought instantly to have been acceded to. The refusal to accede to that request has led to the whole of the litigation.

Therefore, on the express terms of the contract, I come to the conclusion that the Plaintiff was entitled to the first life estate. If the contract is not conclusive on that, then the rule of the Court, as laid down in *Corley* v. *Lord Stafford* (1) and the other cases, is conclusive. The husband having undertaken to perform the duty of having the settlemeut prepared, was bound to have only such a settlement prepared under the contract as would give Mrs. *Clark* the full benefit of the property for her separate use without anticipation. On these grounds I have not a shadow of doubt that she should have been the first tenant for life, and the settlement must be corrected accordingly.

That being the result, there only remains the painful question of costs, which I am afraid are very heavy. The next friend of the lady is her brother, a beneficed clergyman, who has undertaken the responsibility of the suit for her. He ought to be indemnified against costs. How is he to be so? Mr. *Clark*, I am satisfied, cannot pay. He may have the means hereafter; but as the whole litigation has been caused by himself, and by the improper, unprofessional, and most reprehensible conduct of his agent, Mr. *Girdwood*, I cannot do otherwise than give a decree with costs against Mr. *Clark*. There are some parts of Mr. *Clark's* conduct which I think are not discreditable to him, but the circumstances connected with the entering into this contract are excessively discreditable to him.

(1) 1 De G. & J. 238.

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Then I am by no means satisfied with the conduct of the trustee, Mr. *Darton*. He is a man of respectability, but I am sorry to say I think in this transaction he was guilty of great want of caution. He knew that this man was a widower with four children, that he was destitute and without means of gaining a livelihood. In spite of that he acquiesced in these transactions, to which he ought never to have been a party. He ought to have warned the parties, and to have advised the lady not to get married in such a hurry to a man who could not support her or her children. On this ground I must direct that Mr. *Darton* must bear his own costs.

The more material question is, what I am to do with Mr. *Girdwood*. It was stated by his counsel that he would not ask for costs. If he had done so, he would certainly not have got them. However, there is a higher point, whether I am not bound to make him pay the costs. It is legitimate in all these cases to look to the cause of the litigation. Mr. *Girdwood* never ought to have prepared the contract under the circumstances. I laid down a rule in *Baker* v. *Loader* (1), which I have not heard questioned, that if solicitors will prepare documents of a grossly improper character, and which never ought to have been prepared, and the preparation and execution of such deeds lead to litigation, the solicitor who is the cause ought to be saddled with the costs. I can have no doubt that the settlement prepared by Mr. *Girdwood* with the interlineation is one which no solicitor ought to have prepared under the circumstances, and his conduct has been the cause of the whole of this litigation. After the litigation arose, the conduct of Mr. *Girdwood* is the most incomprehensible I have ever seen. He was one of the trustees of that settlement, which was executed on the 6th of November, 1872. He claimed the possession of the document as trustee, and was perfectly justified in retaining it, and it was his duty to do so; but in the spring of 1874 Mr. *Clark* asked Mr. *Girdwood* to let him have a copy of that settlement, and he importuned him to do so, but although he was repeatedly applied to, this request was not complied with. Now Mr. *Girdwood* held the document as trustee, and he had prepared it as solicitor, and it was his duty, the very first day the

(1) Law Rep. 16 Eq. 49.

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request was made, to comply with it, but down to the institution of this suit Mr. *Clark* had failed to obtain a copy of his own marriage settlement. Then the Plaintiff, being totally in ignorance of what that document was, applied to her solicitors, Messrs. *Bloxam, Ellison, & Co.*, gentlemen of the highest standing in the profession, and they wrote to Mr. *Girdwood* to let them have a copy of this settlement, but this request was refused. The excuse made by Mr. *Girdwood*, that he was too much occupied in other business to attend to this request, is a mere subterfuge. What his motive was I cannot understand. It is impossible to account for his conduct. At length, for the purpose of obtaining a knowledge of the contents of that settlement, a very short bill was first filed, containing only three pages. After the bill was served upon Mr. *Girdwood*, an application was made to him to know the contents of the document, but still he refused. Then there was a summons for affidavit of documents. That was resisted. At last the order was made, but it was not obeyed. An attachment was issued, but even then he refused to produce the settlement. What can be said of a solicitor who adopts such a line of conduct as this? If Mr. *Girdwood* had given the parties a copy of the document at an early period I believe Mr. *Clark* would have submitted to alter it. When at last the settlement was produced, and the effect of it was discovered, this bill was amended, and has now come on for hearing.

The same elements exist here as existed in the case of *Baker* v. *Loader* (1). The whole conduct of Mr. *Girdwood* has been wrong, and this has led to this litigation; therefore, on the principles upon which I acted in that case, he must pay the costs of the suit from the beginning to the end. The decree will be according to the prayer of the bill, inserting the words "without power of anticipation." "That under the circumstances the Plaintiff is entitled in equity for her life for her separate use, without power of anticipation, to the property, estate, and effects of or to which she was possessed or entitled prior to and at the date of her marriage with the Defendant *Clark*." And order the Defendants *Clark* and *Girdwood* to pay costs up to and inclusive of the hearing.

(1) Law Rep. 16 Eq. 49.

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Higgins:—Mr. *Darton* desires to retire from the trusteeship, and Mr. *Girdwood* also. Therefore there should be liberty to apply at Chambers for the appointment of new trustees if necessary; although, probably, it will not be necessary, as there are trustees under the Plaintiff's former settlement, and also trustees of Mr. *George's* will.

MALINS, V.C.:—Then it will be: "The Defendants *Girdwood* and *Darton* desiring to retire from the trusteeship, they are removed, and liberty to apply at Chambers for the appointment of new trustees, if necessary."

C. A.

Girdwood, by leave of the Vice-Chancellor, appealed from this decree so far as it made him liable to pay the costs of the suit. The appeal was heard on the 23rd and 24th of November.

Argument.

Cracknall, for the Appellant:—

The Vice-Chancellor went upon *Baker* v. *Loader* (1), but I submit that that case goes too far. If a solicitor makes himself a party to a fraud, and an action is brought to impeach the fraudulent transaction, he can, no doubt, be made a party, and costs given against him; but it was never heard of that a person not interested should be made a party to a suit, and costs asked against him, on the ground that the suit was rendered necessary by his having made a blunder. That he is already a party to the suit in another capacity cannot alter the right to relief against him.

Higgins, Q.C., and *Ingle Joyce*, for the Plaintiff.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

The Appellant was very wrong in not producing the articles when applied for on the part of the Plaintiff, and in not furnishing a copy of them, and if the suit had retained its original character it would have been right to make him pay the costs of it. But after the articles had been produced the Plaintiff turned the suit into one of quite a different character, a suit to have them recti-

(1) Law Rep. 16 Eq. 49.

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fied. The husband resisted this; the parties were examined and cross-examined, and ultimately the articles were rectified in spite of the opposition of the husband. We are of opinion that there is no reason for making the solicitor pay the costs of this litigation between the husband and wife, and that to do so would be an extension of the jurisdiction of the Court. The Court has jurisdiction in cases of fraud, and where a person against whom no relief could otherwise be asked is made a party to a suit on the ground of fraud, it is because the Court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been acting participators in the fraud, and it can, therefore, make any party to the fraud pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part. But the Court has no jurisdiction to order a solicitor to pay the costs of a suit because it has been rendered necessary by his having made a blunder. If Mr. *Girdwood* acted as solicitor to the Plaintiff and made a blunder, the Plaintiff's remedy against him is by an action for professional negligence, and the Vice-Chancellor has gone too far in making him pay the costs of that part of the litigation, which can at worst only be attributed to his having made a mistake. He is, in strictness, liable to pay the costs of the first part of the litigation which arose from his not producing the articles, and he ought to receive his costs of the subsequent litigation relating to rectification. We are of opinion, therefore, that upon the whole he ought neither to receive nor pay costs, and that there should be no costs of the appeal.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Bloxams & Ellison; H. W. Christmas; F. T. Girdwood.*

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C. A. 1877 *Nov.* 14, 24.

BERDAN *v.* BIRMINGHAM SMALL ARMS AND METAL COMPANY.

[1876 B. 253.]

Practice—Time for Appeal—Refusal of Application—Several Claims joined in one Application—Rules of Court, 1875, *Order* LVIII., *r.* 15.

Where several distinct claims are joined in one application, and an order is made allowing some of them and making no mention of the others, an appeal asking that all the claims should be allowed must be brought within twenty-one days from the hearing of the application.

Statement.

THE Plaintiff in this action having delivered particulars of the breaches of which he complained, of an agreement mentioned in the statement of claim, so far as such breaches consisted of infringements of the Plaintiff's patent rights, the Defendants took out a summons to the following effect:—

"That the particulars of breaches delivered by the Plaintiff on the 9th of July, 1877, may be amended, or for better particulars as hereinafter mentioned.

"1. That the words, 'and other large numbers' in every paragraph of the said particulars may be struck out, or that the Plaintiff may be ordered to deliver to the Defendants better particulars of the other large number of cartridge cases referred to in the said particulars."

2 and 3 need not be set out.

"4. For better particulars of the drawings mentioned in paragraph 5 of the said particulars.

"5. That paragraph 8 of the said particulars may be struck out, or that . . ."

On the 30th of July, 1877, Vice-Chancellor *Hall* made the following order:—

"That the Plaintiff deliver to the Defendants further and better particulars of the drawings mentioned in paragraph 5 of the said particulars, and that paragraph 8 of the said particulars

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be struck out, and it is ordered that the costs of this application be costs in the action."

On the 22nd of August, within twenty-one days from the order being drawn up, the Defendants gave notice of appeal that this order might be discharged and in lieu thereof an order made according to the terms of the summons, or that such other order might be made as to the Court of Appeal might seem right.

The appeal came on for hearing on the 14th of November.

Argument.

Beale, for the Plaintiff, took the objection that the appeal was out of time: *Trail* v. *Jackson* (1).

W. Pearson, Q.C., and *J. A. Cross*, for the Appellants:—

In *Trail* v. *Jackson* the part of the application which was not granted was expressly refused, here there is no express refusal. The rule in *Trail* v. *Jackson* ought not to be extended.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

One great object in framing the rules as to appeals was to limit Appellants as to time, in order that there might be no unnecessary delay. When an interlocutory application is made it may be wholly or partially successful, or be wholly refused. If it is refused the applicant knows the fact from the time when it is disposed of by the Judge, and the time allowed for an appeal runs from that time. If it is granted, but in a form not satisfactory to the applicant, it is only reasonable that he should know the precise terms of the order before he determines whether he will appeal. In that case, therefore, the time for appealing does not begin to run till the order has been drawn up. Within which rule does the present case fall? A number of distinct things were asked for, two of them were granted, the rest were refused, for the order is silent about them. The Appellant does not complain of anything that is found in the order, but contends that the other things ought to have been granted. That, in my opinion, is an appeal from a refusal to make an order. The case is not reasonably distinguishable from *Trail* v. *Jackson*, a decision of the Court of

(1) 4 Ch. D. 7.

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C. A. 1877 BERDAN v. BIRMINGHAM SMALL ARMS AND METAL COMPANY.

Appeal, and one from which, were the matter open, I should see no reason for dissenting.

JAMES and BAGGALLAY, L.JJ., concurred.

Solicitors: *Sharpe, Parkers, & Co.; Whateley, Milward, & Whitehead.*

C. A. 1877 Dec. 1.

In re HINDS (A LUNATIC).

Lunacy—Insolvency—Contingent Interest—Close of Insolvency—Pro interesse suo.

In 1854 a person entitled to a contingent future interest in a fund took the benefit of the *Insolvent Act*, but did not mention this interest in his schedule. In 1876 the contingent interest vested in possession.* In the same year he was found lunatic, and shortly afterwards an order was made giving the holder of the fund liberty to pay it into Court to the credit of the lunacy, and directing it to be invested and the income paid to the committee. Shortly afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the Chancery Division for its recovery. The Court ordered a transfer of the fund as prayed.

Statement.

ON the 19th of April, 1854, *Samuel Hinds*, being then in prison for debt, filed his petition in the Insolvent Court for his discharge, under the then Acts for the relief of insolvent debtors, and on the 20th of April, 1854, the usual order was made, vesting his estate in the provisional assignee.

At that time, under the will of a testator who had died in 1827, a sum of £3750, *Barbadoes* currency, was held in trust for *Philip Hinds* for life, and after his death for all his children who should be living at his decease, in equal shares. *Samuel Hinds* was one of the children of *Philip Hinds*, but his contingent interest in this fund was not included in the statement of his property filed in the insolvency.

On the 1st of January, 1876, *Philip Hinds* died, leaving *Samuel Hinds* and two other children surviving him.

On the 4th of November, 1876, *Samuel Hinds* was found lunatic by inquisition, and the Master, by his report, dated the 23rd of

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April, 1877, found that part of his property was £801 5s., being the sterling value of one-third of the above sum of *Barbadoes* currency, and that the trustee of the will was ready to pay over such £801 5s., with an arrear of interest, as the Court should direct.

Statement.

On the 14th of May, 1877, an order was made on a petition for confirming the Master's report and for consequential directions. The provisional assignee, having obtained information about the fund, wrote to the solicitors having the conduct of the lunacy proceedings, asking them to have the drawing up of the order stayed. The petition was accordingly, by direction of the Lords Justices, placed in the paper again on the 9th of June, 1877, when the provisional assignee appeared by counsel and opposed the carrying over of this fund to the credit of the lunacy. An order was made confirming the Master's report, appointing a committee of the person and estate, giving liberty to the holder of the £801 5s. to pay it into Court to the credit of the lunacy, and to pay the arrear of interest to the committee. It was ordered that the £801 5s., when paid in, should be invested in consols and the dividends paid to the committee. And the Court, being of opinion that the provisional assignee had no right to be heard, ordered him to pay the costs occasioned by the adjournment of the petition.

The provisional assignee then presented a petition in the lunacy, submitting to the jurisdiction, and praying that the fund might be transferred to the account at the bank intituled "The account of the late Insolvent Debtors Court," or that the Court would give him leave to take such proceedings as he might be advised in the Chancery Division for the recovery of the fund.

Argument.

Eddis, Q.C., and *Langley*, for the Petitioner:—

Though the insolvency is closed by 32 & 33 Vict. c. 83, s. 15, the effect of such closing is only to put the insolvent into the *status* of a discharged bankrupt. Now, by the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), ss. 51, 52, the outstanding property of the bankrupt can be got in and dealt with, and dividends declared, notwithstanding the close of the bankruptcy. The interest of the insolvent in this fund being a contingent interest, and not a mere

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C. A. 1877

In re HINDS (A LUNATIC).

possibility vested in the provisional assignee: *Higden* v. *Williamson* (1).

[JAMES, L.J.:—It is needless to cite cases to prove that.]

Argument.

Romer, for the Committee:—

I submit that under 32 & 33 Vict. c. 83, s. 15, the insolvency is closed to all intents and purposes, and no proceeding can be taken under it, no application having been made under sect. 15, sub-sect. 2, to enlarge the time. This is after-acquired property coming in after the insolvency was finally closed.

Judgment.

THEIR LORDSHIPS (*James*, *Baggallay*, and *Thesiger*, L.JJ.) considered that the contingent interest of the insolvent passed by the vesting order, and that the close of the insolvency did not prevent the distribution of the fund among the insolvent's creditors. An order was accordingly made for payment of the costs out of the cash in hand, and for payment of the residue and transfer of the capital as prayed.

Solicitors: *A. S. Twyford*; *Hollams, Son, & Coward.*

(1) 3 P. Wms. 132.

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WINN *v.* BULL.

M. R.
1877
Nov. 19.

[1877 W. 197.]

Agreement for Lease—Stipulation for Formal Contract—Specific Performance—Statute of Frauds.

By a written agreement the Defendant agreed with the Plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—

Held, that there was no final agreement of which specific performance could be enforced against the Defendant.

Statement.

ON the 16th of March, 1877, the Plaintiff and Defendant entered into and signed the following agreement for a lease of a freehold house belonging to the Plaintiff:—

"An agreement entered into between *William Winn* (the Plaintiff) of the one part, and *Edward Bull* (the Defendant) of the other part: whereby the said *William Winn* agrees to let and the said *Edward Bull* agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling-house and premises known as '*Westwood*,' situate in the *Avenue, Southampton*, as the same were lately in the occupation of Mrs. *Sullivan*, at the yearly rent of £180, the first year's rent to be allowed to the said *Edward Bull* and to be laid out by him in substantial repairs to the property. This agreement is made subject to the preparation and approval of a formal contract.'

No formal or other contract was ever entered into between the parties.

The Plaintiff's solicitor subsequently sent the Defendant's solicitor a draft of the proposed lease containing covenants on the part of the Defendant to keep the premises in repair.

The Defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the Plaintiff insisting that the lease should remain substantially in its original form, whereas the Defendant contended that its terms were contrary to the intention of the agreement, and he ultimately

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M. R. 1877 WINN v. BULL.

refused to take a lease at all. The Plaintiff thereupon brought this action claiming specific performance of the agreement.

Statement.

In his statement of defence the Defendant relied upon the *Statute of Frauds*, alleging that the agreement was conditional only, and that no final agreement for a lease was ever reduced into writing or signed by him or his agent within the meaning of the statute.

The Plaintiff then joined issue, and the action now came on for trial.

Argument.

Chitty, Q.C., and *Jolliffe*, for the Plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing "usual covenants," which would include a covenant to repair; and that the final clause meant nothing more than that the parties should be bound in a more formal manner. They referred to *Rossiter* v. *Miller* (1), *Crossley* v. *Maycock* (2), and *Chinnock* v. *Marchioness of Ely* (3).

Roxburgh, Q.C., and *Maidlow*, for the Defendant, were not called upon.

Judgment.

JESSEL, M.R.:—

I am of opinion there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, "We will have the terms put into form," then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Now with regard to the construction of letters which are relied upon as constituting a contract, I have always thought that the authorities are too favourable to specific performance. When a man agrees to buy an estate, there are a great many more stipulations

(1) 5 Ch. D. 648. (2) Law Rep. 18 Eq. 180.
(3) 4 D. J. & S. 638.

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wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid. What is called an open contract was formerly a most perilous thing, and even now, notwithstanding the provisions of a recent Act of Parliament—the *Vendor and Purchaser Act*, 1874—no prudent man who has an estate to sell would sign a contract of that kind, but would stipulate that certain conditions should be inserted for his protection. When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing. Indeed, notwithstanding protective conditions, the vendor has not unfrequently to allow a deduction from the purchase-money to induce the purchaser not to press requisitions which the law allows him to make.

All this shews that contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter.

When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the Plaintiff says in effect, "I agree to grant you a lease on certain terms, but subject to something else being approved." He does not say, "Nothing more shall be required beyond what I have already mentioned," but "something else is required" which is not expressed. That being so, the agreement is uncertain in its terms and consequently cannot be sustained.

The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities.

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Judgment.

I will take only one of them, *Chinnock* v. *Marchioness of Ely* (1). There Lord *Westbury* says (2): "I entirely accept the doctrine . . . that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." Then he goes on, "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

That judgment of Lord *Westbury's* did not require any approval, but it was approved of by the Court of Appeal in *Rossiter* v. *Miller* (3).

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the Defendant.

Solicitors: *Lovell, Son, & Pitfield*, agents for *Deacon & Co., Southampton; Stocken & Jupp*, agents for *W. J. H. Bull, Southampton.*

(1) 4 D. J. & S. 638. (2) 4 D. J. & S. 645, 646.
(3) 5 Ch. D. 648.

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FENTON *v.* WILLS.

V.-C. B.
1877
Nov. 9.

[1875 F. 66.]

Administration—Costs—Lapsed Share of Personalty—Exoneration.

A testator bequeathed a sum of consols and the residue of his personal estate to trustees to hold in equal fifths upon certain trusts. One fifth share lapsed. In a suit for the administration of the testator's real and personal estate:—

Held, that the costs of the suit were payable out of the general personal estate, and not primarily out of the lapsed share.

Trethewy v. *Helyar* (1) followed.

Statement.

DAVID FENTON, by his will, dated the 20th of November, 1828, devised and bequeathed all his real estate and a sum of £10,800 consols and the residue of his personal estate, not including in the term "residue" the said £10,800 consols, to trustees to hold in equal fifths upon certain trusts for the benefit of his children and their issue.

The testator died in 1831. A suit to administer his real and personal estate was commenced in February, 1875, and a decree was made in July, 1875. One of the fifth shares had lapsed.

The suit now came on to be heard on further consideration, the only question being whether the costs of the suit were to be borne primarily by the lapsed share or by all the shares rateably, that was to say, by the general personal estate.

Argument.

Hemming, Q.C., and *Jolliffe*, for the next of kin:—

The case in principle is undistinguishable from *Trethewy* v. *Helyar* (1), where the Master of the Rolls held that the costs of an administration suit could not be thrown primarily upon a lapsed share of residuary personalty, but must be paid in the first instance out of the personal estate. He shews conclusively that there can be no residue proper until all costs and expenses have been paid. It is true that in *Scott* v. *Cumberland* (2) and *Gowan* v. *Broughton* (3) Vice-Chancellor *Malins* expressed a contrary

(1) 4 Ch. D. 53. (2) Law Rep. 18 Eq. 578.
(3) Law Rep. 19 Eq. 77.

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FENTON v. WILLS.

opinion; but *Scott* v. *Cumberland* (1) was a case of real estate, and in *Gowan* v. *Broughton* (2) the opinion of the Vice-Chancellor was a mere *dictum*, unnecessary for the decision of the case.

Argument.

Kay, Q.C., and *Warmington*, for the Plaintiffs, took no part in the arguments.

Sir *H. Jackson*, Q.C., and *H. Burton Buckley*, for the children of a tenant for life who took shares under the will:—

No doubt there is a conflict of authority, but *Scott* v. *Cumberland* and *Gowan* v. *Broughton* are in our favour. So also is *In re Ham's Trust* (3), which was not cited before the Master of the Rolls. *Trethewy* v. *Helyar* (4) is also distinguishable from this case. It was a simple gift of residue. Here there is a specific bequest of personalty and residue to a class in shares, and the lapsed share, therefore, must exonerate the other shares.

B. B. Rogers, *Batten*, *J. Beaumont*, and *W. Erskine*, for other parties.

Judgment.

BACON, V.C.:—

Although this case is not identical with *Trethewy* v. *Helyar*, it is so nearly identical that there should be no difference between them. In that case the judgment of the Master of the Rolls was very plain, and was given after considering all the authorities, except *In re Ham's Trust*, which does not seem to have been mentioned. He acted on the well-settled principle that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of a testator. The Court is now called upon to decide whether the costs of this administration suit are to be paid out of the lapsed share or out of the general personal estate. I cannot see any difference in principle between this case and *Trethewy* v. *Helyar*. I do not undertake to reconcile the difference which exists in the authorities. I can only decide this case by applying

(1) Law Rep. 18 Eq. 578.
(2) Ibid. 19 Eq. 77.
(3) 2 Sim. (N.S.) 106.
(4) 4 Ch. D. 53.

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to it the principle I have referred to. Dealing, therefore, with this case as a question of principle, and guided by that principle and not only by the authorities, I am of opinion that the costs of this administration suit must come out of the general personal estate.

Solicitors: *Armstrong & Lamb; Linklaters & Co.; Courtenay & Croome; J. H. Lydall; J. Letts; W. Bristow.*

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V.-C. H.

1877

Aug. 2.

In re MITCHELL'S TRADE-MARK.

Trade-mark—Single Letter—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *ss.* 1, 10—*Trade Marks Registration Amendment Act*, 1876 (39 & 40 *Vict. c.* 33), *s.* 1.

A single letter cannot be registered as a trade-mark under the Trade Marks Registration Acts.

Statement.

THIS was an application by way of motion on behalf of the firm of Messrs. *William Mitchell*, of *Birmingham*, steel-pen manufacturers, that the register of trade-marks might be rectified by entering thereon the name of the applicants as the proprietors of twenty-three trade-marks, each of which consisted of a single letter of the alphabet raised in relief upon one of their steel pens, and indicating a particular sort of pen, the whole twenty-three comprising the various letters of the alphabet from A to W inclusive, the letter A being the particular trade-mark in respect of which this application was made.

The evidence in support of this application shewed that the trade-marks which Messrs. *Mitchell* now sought to register had been used by their firm, and recognised by the trade as the marks of their firm for about thirty years; that the Messrs. *Mitchell* had duly made application to the Registrar of Trade-marks, and had duly advertised their application for three months in the official paper, the *Trade Marks Journal*, in compliance with the provisions of the *Trade Marks Registration Act*, and the rules thereunder, without any person coming forward in opposition; but that the Registrar had declined to register the marks on the ground that, under the Acts of 1875 and 1876, a single letter could not be registered as a trade-mark. The present application was made under the 5th section of the Act of 1875, and rules 42 and 43 of the Rules thereunder.

The portions of the Acts upon the construction of which the questions principally turned were, the 1st section of the *Trade Marks Registration Act*, 1875, by which was established "a register of trade-marks, as defined by this Act;" the 10th section of the same Act, which is, so far as is material, as follows:—

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"For the purpose of this Act:

"A trade-mark consists of one or more of the following essential particulars; that is to say,

"A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

"A written signature or copy of a written signature of an individual or firm; or

"A distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also

"Any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act, may be registered as such under this Act."

Statement.

The preamble of the *Trade Marks Registration Amendment Act*, 1876, which refers to the provision of the principal Act, that a person shall not be entitled to institute proceedings to prevent the infringement of any trade mark, "as defined by the principal Act, until and unless such trade mark is registered in pursuance of that Act;" and the 1st section of the *Amendment Act*, which, so far as is material, is as follows:—

"From and after the 1st day of July, 1877, a person shall not be entitled to institute any proceeding to prevent, or to recover damages for the infringement of any trade mark, as defined by the principal Act, until and unless such trade mark is registered in pursuance of that Act, or until and unless with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof as a trade mark under the principal Act shall have been refused as hereinafter is mentioned."

Argument.

Theodore Aston, Q.C., and *W. Barber*, for the applicants:—

Every mark which was a trade-mark entitling its proprietor to protection before the passing of the Act of 1875, may be registered as a trade-mark under that Act: *In re Barrows' Trade-Marks* (1).

In that case the trade-mark admitted to registration consisted

(1) 5 Ch. D. 353.

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V.-C. H. 1877 — *In re* MITCHELL'S TRADE-MARK. — Argument.

of the three letters B B H, while the use of a single letter twice repeated as a trade-mark has also been protected: *Ransome* v. *Bentall* (1); *Kinahan* v. *Bolton* (2). If so, why should not the use of a single letter be protected?

Before *Hall* v. *Barrows* (3) it was questioned whether there could be any property at all in a trade-mark; that case decided that the jurisdiction of the Court with regard to trade-marks rested upon property; and a clear definition of a trade-mark is given in the *Merchandise Marks Act*, 1862 (25 & 26 Vict. c. 88). By the 1st section of that Act it was enacted that the expression "trade-mark" should include "any and every name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark lawfully used by any person to denote any chattel," as being of his manufacture; and to forge or falsely apply any such mark with intent to defraud was made a misdemeanor; while by the 11th section of the same Act the provisions therein concerning any act thereby declared to be a misdemeanor were not prejudicially to affect any right to which the person aggrieved was entitled either in law or in equity. Thus before the *Trade Marks Registration Act* a single letter might be a trade-mark, in the use of which the proprietor was entitled to protection, and the use of which in fraud of his right would subject the wrong-doer to criminal proceedings. Then by the Act of 1875 two classes of trade-marks may be registered: first, the things defined by the Act to be trade-marks; secondly, things which were trade-marks before the passing of the Act; and though we contend that every person who had prior to the 13th of August, 1875, the exclusive right to any trade-mark, has a right to register it, even though it does not come under the definition of a trade-mark given in sect. 10 of the Act of 1875, the trade-marks ought to be registered in the present case, *i.e.*, a single letter does come within the words of the Act. The plural word "letters" in sect. 10 must be held to include a single letter, if not, the expression "combination of letters" used immediately afterwards would be unnecessary. Again, in the enactment in the same section as to the marks in use before the Act, the word "letters" is used, and here the word

(1) 3 L. J. (Ch.) 161. (2) 15 Ir. Ch. Rep. 75.
(3) 4 D. J. & S. 150.

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"combination" does not govern the word "letters," but only the word "figures," which immediately follows it. These marks, which each consist of a single letter, ought accordingly to be admitted to registration.

Rigby, for the Registrar of Trade-marks:—

The contention that every trade-mark which was the subject of property before the Trade Marks Registration Acts is entitled to registration under them is displaced by the Acts themselves. The 1st section of the Act of 1875 establishes a register, not of trade-marks in general, but of trade-marks "as defined by this Act"; the 10th section defines what is to be a trade-mark "for the purposes of the Act"; only such marks as are so defined can be registered, and a single letter is not one of them. The *Amendment Act* of 1876 shews still more clearly that it is not every trade-mark which is to be put on the register. The preamble speaks of "any trade-mark as defined by the principal Act." The 1st section repeats the same expression as applied to things the registration of which has been allowed, but uses the expression "device, mark, name, combination of words, or other matter or thing in use as a trade-mark before the passing of the principal Act," as applied to things the registration of which has been refused; thus shewing that there were in the contemplation of the Legislature two classes of cases, one in which registration has properly been allowed, the other in which registration has properly been refused, although refused as to a mark in use before the principal Act. Thus we are remitted to the definition contained in the principal Act. The general proposition, as an authority for which *In re Barrows' Trade-marks* (1) was cited, is inconsistent with the Acts; and that case was appealed, but on the opening of the appeal a suggestion was made by the Court which had the effect of reconciling the parties, and the appeal was not proceeded with. No member of the Court, however, shewed any leaning to the doctrine that a trade-mark used before the Act was entitled to registration, whether within the definition of the Act of 1875 or not, and it cannot be considered that there is any binding decision to that effect. The Registrar of Trade-marks is, under the 68th

(1) 5 Ch. D. 353.

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V.-C. H. 1877

In re MITCHELL'S TRADE-MARK.

Argument.

of the Rules under the *Trade Marks Registration Act*, bound to conform to the directions of the Commissioners of Patents, and they have directed him not to register as a trade-mark a single letter; their decisions are, however, not intended to be final, but to be open to revision by the Court. Then as to definitions contained in the Acts. Under sect. 10 of the first Act a trade-mark must consist of certain "essential particulars," *i.e.*, first, certain things, "to which may be added," amongst other things, "any letters" or "combination of letters." So that a word or combination of letters not used before the Act cannot be registered alone without the other essential particulars: *Ex parte Stephens* (1). Secondly, "any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act." So that the two classes are not, first the defined, and secondly, all others, but all are defined; and, moreover, the word "combination" governs the word "letters" as much as the word "figures." Even if not, the words "special and distinctive" govern the word "letters," and the twenty-three first letters of the alphabet cannot be said to be either special or distinctive. A single letter, therefore, cannot be admitted to registration.

Judgment.

HALL, V.C.: —

I am of opinion that, according to the true construction of the *Trade Marks Registration Acts*, 1875 and 1876, this application cannot be granted.

The definition of that which, for the purposes of the Act, is to be a "trade-mark" is given in the 10th section of the Act of 1865. That section, so far as is material, refers to two descriptions of trade-marks; one is "a distinctive device, mark, heading, label, or ticket," to which may be added "any letters, words, or figures, or combination of letters, words, or figures"; the other is "any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of this Act."

The trade-mark which the applicants in this case seek to register is not within the first of these definitions, nor is it within

(1) 3 Ch. D. 659.

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the other "a special and distinctive word, or combination of figures or letters." As I read the words "combination of figures or letters used as a trade-mark before the passing of this Act," the word "combination" is associated with the word "letters" as well as with the word "figures." Therefore, upon the true construction of the Act, no provision is made for the registration of a single letter.

Solicitors for representatives of *W. Mitchell*: *Thomas White & Son.*

Solicitors for the Registrar of Trade-marks: *Hare & Fell.*

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FRY, J.
1877
Nov. 5.

HART *v.* SWAINE.

[1876 H. 421.]

Rescission of Contract—Setting aside Sale of Land after Conveyance—Fraud—Misrepresentation—Copyhold Land sold as Freehold.

A vendor sold land as freehold, received the purchase-money, and conveyed the land as freehold. Afterwards the purchaser, for the first time, discovered that the property was really copyhold. The vendor alleged that he made the representation believing it to be true:—

Held, that, assuming that he had made the representation *bonâ fide*, the vendor had committed a legal fraud; that the sale must be set aside and the purchase-money repaid with interest; and that the vendor must pay all the expenses which the purchaser had incurred in consequence of the purchase.

Statement.

THIS action was brought to set aside a sale of a piece of land by the Defendant to the Plaintiffs, on the ground that the land was represented by the Defendant to be of freehold tenure, whereas it was in fact copyhold.

The land in question was a field containing about four acres. On the 22nd of February, 1876, the Defendant entered into a written agreement with the Plaintiffs to sell the piece of land to them for £450, the land being described in the contract as freehold. A deposit of £50 was paid by the Plaintiffs. An abstract of title was furnished by the Defendant, which shewed a good freehold title to the property. The title was accepted by the Plaintiffs, and on the 24th of June, 1876, the balance of the purchase-money was paid, and the Defendant executed a conveyance of the land to the Plaintiffs as freehold. The conveyance contained a covenant by the Defendant with the Plaintiffs that, notwithstanding any act, deed, or thing by the Defendant done or executed or knowingly suffered to the contrary, he had good right to grant the hereditaments and premises thereby granted, or expressed so to be, unto and to the use of the Defendants, their heirs and assigns, in manner aforesaid.

In August, 1876, the Plaintiffs advertised the land for sale by auction in lots. The steward of the manor of which the land was held saw the advertisement, and gave notice to the Plaintiffs that the land was copyhold, and it was ascertained that this was

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the fact. The Plaintiffs, in consequence of this, were unable to go on with the intended sale. This action was then commenced, by which the Plaintiffs claimed to have the sale to them set aside, and the agreement of the 22nd of February, 1876, and the conveyance of the 24th of June, 1876, cancelled; that the Defendant might be ordered to repay the purchase-money with interest, and also that he might be ordered to pay damages and the costs of the action. This was the trial of the action. By the Defendant's evidence it appeared that he purchased the land in question (together with some other property consisting of a house and garden) in the year 1871, from one *Thomas Chamberlain*. In the contract for that purchase the property purchased was described as "a freehold house and premises and four acres of land, about three-fourths freehold and one-fourth copyhold." The abstract of the vendor's title, which was then delivered, commenced with the will dated the 28th of October, 1817, of one *William Piddle*, who devised certain property to his wife for her life, with remainder to his daughter *Ann Piddle* (afterwards *Ann Chamberlain*), the mother of *Thomas Chamberlain*, her heirs and assigns for ever. *Thomas Chamberlain* claimed by descent from his mother. There was nothing in the abstract of title to shew that any part of the property sold was copyhold. The abstract of title delivered by the Defendant to the Plaintiffs was the same as that which he had received from *Chamberlain*, with the addition of the conveyance to himself.

After the agreement had been entered into it was represented by *Thomas Chamberlain* to the Defendant that only about one-quarter of an acre of the field of four acres was of copyhold tenure. This portion being so small in proportion to the whole, the Defendant determined to have the whole property conveyed to him as freehold, so as to save the expense of being admitted, and a conveyance of the whole property was accordingly executed to him by *Chamberlain* as freehold on the 22nd of June, 1871. The Defendant did not search the rolls of the manor, or make any other inquiry, with the view of ascertaining whether any part of the land was copyhold. Soon after the purchase was completed he sold the house and garden to a Mrs. *Swannell*, and after this he remained in undisturbed possession of the field of four acres

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FRY, J. 1877 HART v. SWAINE. Statement.

until he sold it to the Plaintiffs, no demand for any quit-rent being made upon him. He therefore came to the conclusion that, either no part of the property which he had purchased from *Chamberlain* was copyhold, or that the copyhold part was included in that which he had sold to Mrs. *Swannell*, and he made the representation to the Plaintiffs that the field which he sold to them was freehold, in the *bonâ fide* belief that it was so.

It appeared that the four acres were in 1854 (after the deaths of the widow of the testator and his daughter *Ann Chamberlain*), upon the inclosure of some common land, allotted to *James Chamberlain*, the father of *Thomas Chamberlain*, in respect of other copyhold land of which he was tenant as guardian to *Thomas Chamberlain*, who was then an infant, so that the allotment became, by virtue of sect. 94 of the *Incolsure Act* of 1845 (8 & 9 Vict. c. 118), itself copyhold. *Thomas Chamberlain* was the customary heir of *Ann Chamberlain*. No mention of this allotment appeared upon the abstract of title furnished on the occasion of the purchase by the Defendant from *Chamberlain*, nor upon the abstract furnished by the Defendant to the Plaintiffs. It appeared also that, prior to the sale to the Plaintiffs, the Defendant had, early in the year 1876, put up the four acres for sale by public auction, and that on that occasion a Mr. *Smith* publicly stated in the auction room that the land was copyhold, not freehold. No sale was then effected, the reserved bidding not having been reached.

Argument.

Fischer, Q.C., and *W. B. Heath*, for the Plaintiffs:—

The Plaintiffs bought the property on the faith of the Defendant's representation that it was freehold. This representation being untrue, the sale ought to be set aside. *Edwards* v. *M'Leay* (1) is an authority for giving the relief we ask. The Defendant ought also to pay as damages the expenses of the attempted sale by the Plaintiffs.

[They were stopped by the Court.]

Cookson, Q.C., and *C. Browne*, for the Defendant:—

[FRY, J.:—I see no evidence of actual fraud on the part of

(1) Coop. 308; 2 Sw. 287.

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the Defendant; he has only made a mistake. But as he has taken upon himself to assert that the land is freehold, am I at liberty to look into the state of his mind ?]

This is really an action for deceit, and in such a case it is essential to prove actual personal fraud by the Defendant: *Wilde* v. *Gibson* (1); *Sugden's* Law of Property (2). Where the contract for sale has been carried out by the execution of a conveyance, the transaction cannot be set aside unless wilful misrepresentation amounting to fraud is proved. In *Edwards* v. *M'Leay* (3) Lord *Eldon* based his judgment upon the principle that "if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract." That, therefore, was a case of wilful fraud. In *Legge* v. *Croker* (4) Lord *Manners* said: "If it were a wilful misrepresentation the Plaintiff might be entitled to relief; but where the parties have expressed their meaning by a lease, that has been, with due deliberation, executed, and where there is no wilful misrepresentation, nor any mistake in omitting to introduce a covenant respecting this right of way into the deed, it would be very dangerous to correct this deed upon such slight grounds." There is no authority for setting aside an executed contract on the ground of misrepresentation not fraudulent. At any rate, the expenses of the attempted sale by the Plaintiffs are not damages resulting from the misrepresentation.

Fischer, in reply:—

Wilful personal fraud is not necessary to set aside a contract which has been carried out by a conveyance. In *Rawlins* v. *Wickham* (5) an executed agreement for a partnership was rescinded, on the ground that the Plaintiff had been induced to enter into it by a misrepresentation of the amount of the debts of the concern; and it was held that the estate of a deceased partner who had joined in making the representation, but who had done so in the *bonâ fide* belief that it was true, must indemnify the Plaintiff against the debts of the concern.

(1) 1 H. L. C. 605.
(2) Pages 597, 614.
(3) 2 Sw. 289.
(4) 1 Ball. & B. 506, 514.
(5) 3 De G. & J. 304.

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FRY, J. 1877 HART v. SWAINE. Judgment.

FRY, J.:—

In 1871 the Defendant agreed to purchase this and other property from *Chamberlain*, one-fourth part being described in the contract for sale as copyhold. The Defendant had, therefore, full notice that part of the property which he then bought was copyhold, and this was enough to put him upon inquiry as to the facts. He says that what subsequently happened led him to suppose that less than one-fourth of the property was copyhold; and he entertained a vague notion either that no part of what he had bought was copyhold, or that the copyhold part was that which he afterwards sold to Mrs. *Swannell*. This notion, however, did not discharge him from the burden which lay on him to make inquiry as to the real nature of the tenure in case he should sell the property again. Instead of doing this, he sold the land as freehold, and the Plaintiffs bought it as such. The abstract of title which he furnished to them represented the land as having passed under the will of *William Piddle*. The land which he sold did not pass under that will, though that in respect of which it was allotted may have done so. It appears to me that both the allegation in the contract that the land was freehold and the allegation in the abstract that it passed under the will of *Piddle* were false in fact, though I do not say that the Defendant knew them to be so. It now appears that the whole of the four acres was allotted in 1854 to *Chamberlain* as copyhold in respect of other copyhold land which he held. No trace of this transaction appeared upon the abstract, and there was nothing to put the Plaintiffs upon inquiry. The Defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this believing it to be true, the result appears to me to be that which is expressed in the judgment of *Maule*, J., in *Evans* v. *Edmonds* (1), where he says: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his

(1) 13 C. B. 777, 786.

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own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made." That is to say, the Defendant having taken upon himself, with a view of securing a benefit to himself, to assert that the property was freehold, has, in the view of a Court of Law, committed a fraud. The same principle is laid down by *Turner*, L.J., in *Rawlins* v. *Wickham* (1), where he says: "If upon a treaty for purchase one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he surely cannot be heard to say that he knew nothing of the truth or falsehood of that which he represented, and still more surely he cannot be allowed to retain any benefit which he has derived if the representation he has made turns out to be untrue. It would be most dangerous to allow any doubt to be cast upon this doctrine."

It appears to me, therefore, that in this case there has been a legal fraud committed by the Defendant, which has resulted in the sale to the Plaintiffs, and that I am bound by the authorities to give the Plaintiffs the relief which they ask. The judgment will be to set aside the sale to the Plaintiffs, and declare that the deed of the 24th of June, 1876, is inoperative. A memorandum of this judgment must be indorsed by the Registrar on the deed, and then it and the other documents of title in the Plaintiffs' possession will be delivered up to the Defendant. The Defendant must repay the purchase-money, with interest at 4 per cent. from the time of payment, after deducting the amount of the rents and profits derived by the Plaintiffs from the land during their occupation of it. And then I shall direct an account, as in *Edwards* v. *M'Leay* (2), of the expenses incurred by the Plaintiffs in consequence of the purchase of the land; and the Defendant must pay the amount thus found due, as well as the costs of the action.

Solicitors for Plaintiffs: *Hawks, Willmott, & Stokes.*
Solicitors for Defendant: *Denton, Hall, & Barker.*

(1) 3 De G. & J. 316, 317.

(2) 2 Sw. 289.

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FRY, J.

1877

Nov. 10.

NICHOLSON *v.* DRURY BUILDINGS ESTATE COMPANY.

[1876 N. 105.]

*Husband and Wife—Desertion of Wife—Protection Order—Property acquired after Desertion—*20 *&* 21 *Vict. c.* 85, *ss.* 21, 25—21 *&* 22 *Vict. c.* 108, *s.* 8—*Wife's Chose in Action—Reduction into Possession by Husband—Transfer of Shares into Joint Names.*

A married woman became in 1866 entitled, on the death of an intestate, to a share of his estate. Part of her share was paid by the administrator to the husband, and in 1867 some shares in a joint stock company, which had been appropriated by the administrator in respect of the remainder of the wife's share, were, with the assent of the husband and wife, transferred into their joint names. In May, 1874, the husband deserted the wife, and in November, 1874, she obtained from the justices a protection order, by which her property and earnings acquired since the date of the desertion were protected from her husband. In 1876 the company resolved upon a voluntary liquidation, and the liquidator gave notice to the husband and wife that he was prepared to refund £900 in respect of the capital of the shares. The wife thereupon (suing as a *feme sole* under the protection order) commenced an action against the company and the husband, claiming payment of the £900 to her as a *feme sole*. The money was paid into Court:—

Held, that the transfer into the joint names did not amount to a reduction into possession by the husband, and that the wife was entitled to the £900 as a *feme sole* under the protection order, as being property acquired by her after the desertion.

Statement.

THIS was an action by a married woman, suing as a *feme sole* under a protection order, against the above-named company and her husband *Thomas Nicholson*.

The Plaintiff married *Thomas Nicholson* on the 16th of November, 1861. She was a niece and one of the next of kin of *William Furness*, who died intestate on the 26th of March, 1866. A part of her share in the estate was received by her husband, and with the assent of herself and her husband, twelve shares in the Defendant company, which formed part of the estate, were, on the 30th of April, 1867, transferred by the administrator into the joint names of the husband and wife.

The 6th paragraph of the statement of claim contained the following allegations:—

"The Defendant *Thomas Nicholson* received a sum of money

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which exceeded £1000 from the administrator of the estate and effects of the said *William Furness*, on account of the Plaintiff's distributive share of her personal estate, and the said administrator appropriated, as further part of the Plaintiff's share of the estate of the said *William Furness*, certain shares or securities in railway and other public companies, and in consideration of the payment of the said sum of £1000 to the Defendant *Thomas Nicholson*, it was arranged and agreed between the said administrator and the Plaintiff and the Defendant *Thomas Nicholson* (amongst other things) that twelve shares of £100 each in the *Drury Buildings Estate Company*, and £300 consolidated stock of the *Whitehaven and Furness Junction Railway Company*, respectively forming part of the Plaintiff's said share of the personal estate of the said *William Furness*, should be transferred by the said administrator into the joint names of the Plaintiff and the Defendant *Thomas Nicholson*, to the intent that the said shares and stock should not be sold or dealt with by either of them without the consent and concurrence of the other, and should, upon the death of either, become the absolute property of the survivor; and the certificates of the said shares and stock were, with the consent of the Defendant *Thomas Nicholson*, delivered to the Plaintiff by the said administrator, and they have ever since remained and are now in her possession; and in consideration of such arrangement and agreement the Plaintiff agreed to waive her equity to a settlement of her said distributive share of the personal estate of the said *William Furness*."

On the 16th of May, 1874, *Thomas Nicholson* deserted the Plaintiff, and on the 6th of November, 1874, she obtained from the justices in Petty Sessions a protection order under sect. 21 of the Act 20 & 21 Vict. c. 85.

By this order the justices ordered "that the earnings and property of the said *Eleanor Ann Nicholson* acquired or to be acquired since the commencement of such desertion as aforesaid (which desertion we find first commenced on the 16th of May, 1874), shall hereafter be protected from the said *Thomas Nicholson* her husband, and from all creditors and persons claiming, or who may hereafter claim under him: and that all such earnings and property shall

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belong and shall be deemed to belong to the said *E. A. Nicholson* as if she were a *feme sole*."

Statement.

From the date of that order the Plaintiff continued to live separate from her husband. Before the action was commenced the *Drury Buildings Estate Company* had resolved upon a voluntary liquidation, and on the 7th of November, 1876, the Plaintiff received notice from the liquidator that he was prepared to make a first return of £75 per share on the shares of the company, and that on the 9th of November a cheque for the amount payable in respect of the shares standing in the joint names of the Plaintiff and her husband might be received. A similar notice was sent to the husband. On the 22nd of November, 1876, the writ in the action was issued, and on the 1st of December the Plaintiff moved before the Master of the Rolls for an injunction to restrain the liquidator from paying and the Defendant *Nicholson* from receiving the £900 payable in respect of the twelve shares. On the hearing of the motion the Master of the Rolls ordered that the liquidator should pay into Court, to the credit of the action, the sum of £892 (being the residue of the £900, and £12, a dividend due on the shares, after deducting £20 for the liquidator's costs), and that all further proceedings in the action should be stayed as against the liquidator, except for the purpose of enforcing the order, and that the further hearing of the motion should stand over until the trial of the action.

The statement of claim was delivered on the 2nd of January, 1877, and by it the Plaintiff claimed a declaration that she was entitled as a *feme sole* to the £892 in Court, and to any other sum payable in respect of the twelve shares, or to have the same settled on herself and her children, and an injunction against the Defendant *Nicholson*.

Argument.

North, Q.C., and *Speed*, for the Plaintiff:—

The Plaintiff is not bound by the alleged agreement for transfer into the joint names, for she was not competent to enter into such an agreement. There was no reduction into possession of the shares by the husband; the very object of the transfer was to prevent his reducing them into possession: *Prole* v. *Soady* (1).

(1) Law Rep. 3 Ch. 220.

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The money now payable in respect of the shares has, therefore, been acquired by the Plaintiff since the date of the desertion, and is within the protection order. Sects. 21 and 25 (1) of the Act of 20 & 21 Vict. c. 85, shew what the effect of the protection order is. The wife is in the same position as if she had obtained a decree of judicial separation, and has the same rights with regard to property as if she were a *feme sole*. The word "acquired" in the protection order extends to property devolving upon or coming to her. This is shewn by the latter part of sect. 21, and by sect. 25. The order to be obtained must be the order which the wife is entitled to apply for. That this is the proper construction of the section is shewn by *Johnson* v. *Lander* (2); *In re Coward & Adam's Purchase* (3); *In re Insole* (4).

[FRY, J., referred to *Re Whittingham's Trust* (5).]

(1) Sect. 21 provides that "A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband, and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. . . . If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

By sect. 25, "In every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole*, with respect to property of every description which she may acquire or which may come to or devolve upon her: and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabition shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

(2) Law Rep. 7 Eq. 228.
(3) Ibid. 20 Eq. 179.
(4) Ibid. 1 Eq. 470.
(5) 12 W. R. 775.

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Argument.

By 21 & 22 Vict. c. 108, s. 8, it is provided that in every case in which a wife shall have obtained an order to protect her earnings or property, or a decree for judicial separation, "property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree."

[FRY, J.:—If property, which is in reversion at the date of the desertion, is to be deemed to be included in the protection order, how can a subsequent reduction with possession after the date of the order be an acquisition by the wife?]

The object is to benefit the wife, and to prevent the husband from reducing the fund into possession after the date of the order. The second Act shews that the first was intended to extend to property to which the wife was entitled at the date of the desertion, but which she had not actually received, and that is the principle of the decisions.

Cookson, Q.C., and *Badcock*, for the husband:—

The arrangement made between the husband and wife for the transfer of the shares into their joint names amounted to a settlement. If it was not originally binding upon her, she has by her statement of claim adopted and ratified it, she treats it as valuable consideration for her waiving her equity to a settlement, and she could not now claim any such equity.

[FRY, J.:—You must shew a deliberate intention in the pleadings to ratify the agreement. I must look at the whole of the statement of claim.]

If there was not a settlement, at any rate the transfer of the shares into the joint names could only have been made by the direction of the husband; it amounts, therefore, to a reduction into possession by him. Any exercise of ownership by the husband over property coming to him *jure mariti* binds the wife.

[FRY, J.:—Suppose he had put the shares into the wife's sole name, would that have been a reduction into possession by him?]

Yes. The wife's direction to the administrator was worth

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nothing. She had no right to the property unless she came to the Court to enforce her equity to a settlement. The administrator could have obtained a complete discharge by transferring the shares to the husband.

If the wife had died before the transfer into the joint names, the husband would have taken the whole fund as survivor, but he must have taken out administration to the wife. Now, however, if the wife died, he would take the fund simply as survivor, and would not have to take out administration to her. The title of both husband and wife was entirely altered by the transfer, and that amounts to saying that the husband has reduced the fund into possession. The husband, who was the only person entitled to the shares, but for the wife's equity to a settlement, which she took no steps to assert, said to the trustee, Transfer the shares into our joint names. The effect is the same as if the shares had been transferred to the husband, and he had then transferred them into their joint names. The wife's original title is gone, and she is entitled simply as a *cestui que trust* under the settlement made by the husband.

Argument.

As to the effect of the protection order, the Master of the Rolls in *In re Coward & Adam's Purchase* (1), proceeded upon the words "come to, or devolve upon," in sect. 25 of the Act, and did not mean to decide that property vested in the wife in possession, but not actually received by her or her husband before the date of the desertion, was, when afterwards converted into money, property "acquired" by her during the desertion. In that case the money had actually "come to" her by payment after the protection order, and it was held that her receipt was a good discharge to the person who had made the payment.

FRY, J.:—

Judgment.

In my opinion the Plaintiff is entitled to the relief which she asks. The first question is, whether the moneys now payable by the liquidator in respect of the shares which stood in the joint names of the Plaintiff and her husband are or are not property which, within the meaning of the protection order, has been acquired by the wife since the 16th of May, 1874. I am of opinion

(1) Law Rep. 20 Eq. 179.

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Judgment.

that the money was acquired by her when the shares were realized in the winding-up. I think that the position of things is the same as if the shares had remained in the name of the intestate, but appropriated by the administrator to the Plaintiff as one of the next of kin, and the money arising from the realization of the shares had been paid to her by the administrator. If I am right in that view, the case is covered by the decision of the Master of the Rolls in *In re Coward & Adam's Purchase* (1). In that case a married woman, who was entitled to a legacy charged on real estate, which had not been reduced into possession by her husband, obtained a protection order in consequence of her husband's desertion, and the Master of the Rolls held that her receipt was a good discharge for the legacy, which was paid to her by the owner of the estate after the date of the protection order. The Master of the Rolls said (2): "Here the person liable to pay the legacy goes to the wife after the protection order and offers to pay it. He might have paid it to the husband, but, having thus come to the wife and offered to pay it to her, it comes to her within the meaning of the section, and that which never was hers before becomes hers when she is to be considered with respect to it as if she were a *feme sole*. Both on the words of the section, and on the true meaning of the transaction, this is property which she acquires after the date of the protection order." I think, by parity of reasoning, that, although the present right to the shares had vested in the Plaintiff before the desertion, yet, as the shares were not realized till after the desertion, the money arising from the realization is property acquired by her since the commencement of the desertion, and is therefore covered by the protection order.

But it is said that there are two grounds upon which I ought not to come to this conclusion. First, it is said that the Plaintiff herself has alleged in her statement of claim that the transfer of the shares into the joint names was made in consequence of the previous arrangement which is mentioned in paragraph 6. [His Lordship read the paragraph.] It is contended that that arrangement or agreement amounted to a settlement upon the Plaintiff. It is admitted that, independently of the pleadings, such a settle-

(1) Law Rep. 20 Eq. 179. (2) Law Rep. 20 Eq. 181.

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ment would not be binding upon her, but it is said that by alleging in her pleadings the actual existence of the agreement she has done two things: she has ratified the agreement, and has put herself out of Court by that ratification. In other words, I am asked to hold that the Plaintiff has fallen into a trap; that by stating as a fact that which actually happened she has precluded herself from obtaining that relief to obtain which the statement was made. I think the Court would struggle to avoid such a conclusion as that. I shall not allow pleadings to be used for the purpose of shewing that there has been an abandonment of those very rights which they were intended to enforce. If it were necessary I should allow the Plaintiff to amend the statement of claim by inserting an allegation that she does not rely upon, but, on the contrary, repudiates, the agreement which was in fact made. I therefore hold that no settlement has been made which precludes the Plaintiff from making her present claim.

Then, in the second place, it is said that, even if no settlement was made, the transfer of the shares into the joint names amounted to a reduction into possession by the husband. I invited the counsel for the Defendant to give me a definition of reduction into possession. With great prudence and propriety they declined to do this. I intend to imitate their prudence, and not to attempt giving any definition beyond saying this, that, so far as I am aware, nothing has ever been held to amount to reduction into possession of a wife's *chose in action* which does not give the husband for some moment of time absolute dominion over the property without any concurrence of the wife. No authority contrary to this view has been produced, and I believe that none can be produced. If that be so, the question is, whether this fund has ever been for a single moment under the absolute control of the husband? It appears to me that it has not. The shares never passed into his name, and he never had the absolute control of them. I may refer to the definition given by Mr. *Spence* (1). He says, "Reduction into possession as regards *choses in action* means actual payment to the husband in his character as husband, not as trustee, or what is equivalent to it; if the property has been paid to *his* agent, or so dealt with that the property is no

(1) 2 Sp. Eq. Jur. p. 478.

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longer a *chose in action* of the wife, but under the exclusive control of the husband, or has been in the exercise of his exclusive control placed by him in the hands of or transferred to other persons upon some trust inconsistent with the existence of the wife's possible title by survivorship, that will be considered as a reduction into possession. In case a married woman be entitled to a *chose in action*, whether legal or equitable, the mere circumstance of the legal title being changed, without more, does not in general affect her." If that be so, it follows, in my opinion, that there has been in this case no reduction into possession by the husband, inasmuch as the transfer into the joint names was not inconsistent with the wife's title by survivorship. But it is said that the wife's original title was gone by reason of the transfer, and that a fresh title has accrued to her. I do not think that that argument ought to prevail. I shall therefore direct the sum in Court to be paid to the Plaintiff, and I shall declare that she is entitled to any further sums which may become payable in respect of the shares. The Defendant *Nicholson* must pay the costs of the action.

Solicitors for Plaintiff: *Nicol, Son, & Jones*, agents for *C. G. Thomson & Wilson, Kendal.*

Solicitors for Defendant: *Vizard, Crowder, & Co.*, agents for *Lynch & Teebay, Liverpool.*

FRY, J.
1877
Nov. 12, 16.

COCKLE *v.* JOYCE.

[1875 C. 222.]

Practice—Non-appearance of Plaintiff at Trial—Proof by Defendant of Service of Notice of Trial—Rules of Court, 1875, *Order* XXXVI., *rr.* 10, 19, 20—*Setting aside Judgment—Costs.*

Where an action is called on for trial and the Plaintiff does not appear, the Defendant is not entitled to judgment unless he proves that notice of trial has been served upon him.

When the judgment so obtained is set aside, it will be on payment by the Plaintiff of the costs of the day and of the application.

Statement.

THIS action being in the list for the day was called on in its turn. No one appeared for the Plaintiff.

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Fischer, Q.C., and *W. S. Owen*, for one of the Defendants, asked that judgment might be given for him with costs.

Simmonds, for the other Defendant, made a similar application.

Argument.

FRY, J., asked whether the Defendants had proved that they had been served with notice of trial.

Fischer said that this was not necessary under the present practice: Order XXXVI., rr. 10, 19.

FRY, J. (after consulting the Registrar), said that the service of notice of trial must be proved. An affidavit of service might be produced to the Registrar before the rising of the Court, and upon that being done judgment would be given for the Defendants with costs.

Nov. 16. *Karslake*, Q.C., and *Bilton*, now applied under Order XXXVI., rule 20, to have the judgment set aside and the action restored to the list, stating that the leading counsel for the Plaintiff was by accident prevented from appearing when the action was called on, and they asked to have the costs made costs in the cause.

Fischer, Q.C., *W. S. Owen*, and *Simmonds*, for the Defendants, asked that the Plaintiff should pay the costs of the day and of the application, as under the old practice: *Morgan's* Chancery Practice (1).

Judgment.

FRY, J., ordered the judgment to be set aside on payment of the costs of the day and of this application, as a condition precedent; and directed the action to be placed in the list next after the actions in the paper for that day.

Solicitors for Plaintiff: *Sandon, Kersey, & Knight.*
Solicitor for Defendant: *H. Stirke.*

(1) 5th Ed. p. 545.

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FRY, J.
1877
Nov. 17.

WOLLASTON *v.* WOLLASTON.

[1876 W. 244.]

Administration Action—Annuitant.

The legatee of an annuity charged upon residue is entitled to have judgment for administration of the estate.

Statement.

EDWARD L. WOLLASTON by his will bequeathed to his wife, *Mary Wollaston*, his shares in the *Thames Tunnel*, and an annuity of £500 a year, such annuity to be a charge upon his freehold farms in the parish of *Staple*, and upon the other residue of his estate; and he devised the farms and the residue of his estate, real and personal, to *Alexander L. Wollaston*. The testator died in December, 1866, and his will was proved by *Alexander L. Wollaston* and *Frederick L. Wollaston*, the executors. *Alexander L. Wollaston* died in 1874, having appointed by his will *Susannah C. Wollaston*, *Frederick L. Wollaston*, *George H. Wollaston*, and *F. Sandeman*, his executors.

The testator had had seventy-seven *Thames Tunnel* shares, which had been altered to shares in the *East London Railway Company*, and the Plaintiff, *Mary Wollaston*, had in the lifetime of *Alexander L. Wollaston* claimed these shares, *Alexander L. Wollaston* claiming them under another bequest in the will. This action was brought by her against *Frederick L. Wollaston* and the other executors of the will of *Alexander L. Wollaston*, claiming that the estate of *Edward L. Wollaston* might be administered under the Court; that it might be declared that the Plaintiff was entitled to the *East London Railway* shares; and that all necessary accounts might be taken and inquiries made and directions given for the purpose of securing the payment of the annuity of £500 a year to the Plaintiff.

The first question argued on the trial of the action was as to the shares; on which the Court decided, against the Plaintiff, that the Defendants representing the estate of *Alexander L. Wollaston* took these shares under the will of *Edward L. Wollaston*.

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The Plaintiff then asked for judgment for an ordinary administration of the estate of *Edward L. Wollaston.*

North, Q.C., and *Millar*, for the Plaintiff.

Argument.

Cookson, Q.C., and *C. W. Chute*, for the Defendants, contended that an annuitant was not as of course entitled to an administration decree, especially when the annuity was charged on land on which the annuitant could distrain: *Sollory* v. *Leaver* (1), *Kelsey* v. *Kelsey* (2), *Burrell* v. *Delevante* (3), and *Norman* v. *Johnson* (4).

Judgment.

FRY, J.:—

The statement of claim raises two questions. The first, relating to the shares, has been already decided against the Plaintiff. The second question is whether the Plaintiff, as an annuitant, is entitled to judgment for administration. Mr. *Cookson* has argued, first, that the Plaintiff, as an annuitant, is not entitled to have judgment for administration; but in my opinion the charge of an annuity on the residue gives the annuitant a most important interest in the residue, and she is entitled to know the amount of the residue, so as to know the extent of the property out of which her annuity is payable. In my opinion a person who has a charge upon a residuary estate has a right to have the amount and nature of that estate ascertained, otherwise she would have but an idle benefit conferred on her. Mr. *Cookson* has not been able to produce any authority in point, and I therefore determine, upon principle, that the Plaintiff, as an annuitant, is entitled to a judgment for administration.

Solicitor for Plaintiff: *W. H. Tattam.*

Solicitors for Defendants: *J. & R. Gole*, agents for *Hickman & Son, Southampton.*

(1) Law Rep. 9 Eq. 22.
(2) Ibid. 17 Eq. 495.
(3) 30 Beav. 550.
(4) 29 Beav. 77.

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FRY, J.
1877
Nov. 19.

KRONHEIM *v.* JOHNSON.

[1877 K. 30.]

Statute of Frauds, s. 7—Declaration of Trust of Land—Writing—Signature—"Party by Law enabled to declare Trust"—Legal and Beneficial Owner—Unsigned Postscript to Signed Letter on separate Paper.

When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of sect. 7 of the *Statute of Frauds*, is the beneficial owner only.

Tierney v. *Wood* (1) followed.

The absolute beneficial owner of land vested in a trustee wrote a letter to the mother of her infant grandson. The letter was signed with the writer's initials. Inclosed in the same envelope, but on a separate piece of paper, was another document in the handwriting of the same person, and headed "Supplement." This document was not signed in any way. It commenced thus: "I had quite omitted to tell you," but it contained no other reference to the letter, and the letter in no way referred to it. It was alleged that the "supplement" contained a declaration of trust of the land in favour of the infant:—

Held, that the "supplement" was not signed so as to satisfy the statute.

Statement.

THE Plaintiff in this action was a married woman suing by a next friend.

By her statement of claim she alleged that in the latter part of the year 1876, she being then living apart from her husband, arranged with the Defendant *James Isaac Johnson* (who was the father of the wife of her son *Martin Kronheim*) that he should take in his own name the lease of a house called *Stapleford Villa*, and that she should pay towards the purchase-money, which was to be £700, the sum of £250, and that the residue of the purchase-money should be obtained from a building society by a mortgage. At the same time it was arranged between the Plaintiff and *Johnson* that he should procure a deed of settlement to be prepared, whereby the leasehold premises so to be purchased by him should be settled, upon trust, in the first place, to pay the rents and profits to the Plaintiff during her life, and after her death, in case the Defendant *James Judson Kronheim*, an infant (the son of the Plaintiff's

(1) 19 Beav. 330.

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son *Martin Kronheim*), should then have attained twenty-one, upon trust for him absolutely, but, in case he should not survive the Plaintiff, or surviving her should die under twenty-one without lawful issue, then upon trust for *Martin Kronheim* absolutely. The Plaintiff accordingly paid £250 out of her own moneys to *Johnson*, and he obtained a lease of the house to be granted to him for £700, of which the residue of £450 was raised by a mortgage of the house to a building society. The Plaintiff had, out of her own moneys, since paid the instalments in respect of the mortgage to the society as they fell due. On the 1st of January, 1877, *Johnson* executed a deed of settlement of the house by which, after reciting the lease and the mortgage, and that he was desirous of making some provision for his grandson *J. J. Kronheim*, he assigned the house to himself and the Defendant *George Moxon*, upon trust to apply the net income in and towards the maintenance, education, and advancement in life of *J. J. Kronheim* during his minority, and, when and so soon as he should have attained twenty-one, to assign the premises to him absolutely. And, in case he should die under twenty-one, then, from and immediately after his death, the trust premises should revert to and form part of the personal estate of *Johnson*. The Plaintiff did not see the deed before it was executed, and did not obtain a copy of it till the 19th of February, 1877. She then objected to it as not being in accordance with the arrangement come to between her and *Johnson*, and on the 14th of April, 1877, she commenced this action, by which she claimed a declaration that the deed was void, and asked that it might be ordered to be delivered up to be cancelled; that *Johnson* and *Moxon* might be ordered to assign the premises to her, or as she might direct, and that *Johnson* might pay the costs of the action. The Plaintiff's husband and the infant were Defendants to the action.

The Defendants *Johnson* and *Moxon*, by their statement of defence, said that, in order to avoid any difficulty which might be occasioned by the Plaintiff being a married woman, and any question about the rights of her husband in the matter, she requested *Johnson* to carry out her arrangement about the house in his own name, and to make the settlement of the house in favour of the infant as if the property were that of *Johnson*

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himself. Accordingly the property was leased to him, and he entered into various covenants of an onerous nature, including the covenant to pay the rent, and he also, on mortgaging the property to the building society, covenanted with them to pay the mortgage money and interest, and to observe the regulations of the society. After the lease had been granted, and the mortgage effected, *Johnson* desired his solicitors to settle the property, subject to the mortgage, in favour of the infant Defendant, and he did not instruct them to insert any trust in his own favour, but he gave them to understand when they prepared the settlement that the property belonged to him, and they inserted the ultimate trust in his favour in the belief that the property ought to revert to him as the settlor, and without his having given them any instructions to insert such a trust. He believed when he gave instructions for the preparation of the deed that the Plaintiff had informed him that her desire was that the settlement should be made in favour of the infant Defendant, and that she did not desire that it should contain any trust in her own favour or in favour of the infant's father.

On the 9th of December, 1876, the Plaintiff wrote a letter to the wife of her son *Martin Kronheim* (the daughter of the Defendant *Johnson*). Inclosed in the same envelope with this letter, but on a separate sheet of paper, was a postscript written by the Plaintiff. This document was headed "Supplement," and was, so far as material, as follows:—

"I had quite omitted to tell you and *Martin* that the title-deed for *Stapleford Villa* has been made out in *Gampey's* name as if he were the purchaser, and it is currently reported and received as a fact that he has bought the house for his little grandson *Jimmy*. So you and *Martin* must bear this stratagem in mind, and when you speak of or are spoken to about the house, remember it is *Gampey's* gift to little *Jimmy*. Even *Fanny Whitehorne* has learned to consider it as such, so mind this if you ever meet her. *Gampey* is to settle it on *Jimmy* through a deed of trust, as he calls it, which deed he tells me is in process of being made out or drawn up, as it is technically termed. The building society, through whom the house has been bought, have advanced for it £450. I have paid in all into *Gampey's* hands £271, making in

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all £722, including £1 interest on the £20 which was paid for it and as a deposit on the purchase of the house. I have to pay the building society in monthly instalments of £4. I have already paid one month's instalment, and got the company's book with their receipt in it for the same. Thus I have paid down for *Stapleford Villa* £275. I give these details for *Martin's* information, as I thought he would like to know how the matter had been accomplished in a financial point of view, and I hope it will meet with his approval."

The letter was signed with the Plaintiff's initials, but the "Supplement" was not signed in any way.

The Defendant *Johnson* was the person referred to as "*Gampey*," and the infant Defendant was the person referred to as "little *Jimmy*."

The Defendant *Johnson* submitted that he was entitled to be paid by the Plaintiff certain expenses which he had incurred in relation to the lease and the mortgage, and to be indemnified by her, and out of the leasehold premises, against the obligations and liabilities which he had incurred in respect of the leasehold property, and the lease and mortgage thereof.

This was the trial of the action. The facts appearing in the statement of claim were substantially admitted, and no evidence was adduced on either side.

Kekewich, Q.C., and *G. Murray*, for the Plaintiff:— Argument.

It is admitted that the Plaintiff was the beneficial owner of the property. No effectual trust has been declared so as to satisfy sect. 7 (1) of the *Statute of Frauds*. The beneficial owner is "the party who is by law enabled to declare" the trust: *Tierney* v. *Wood* (2). The trustee, who is owner of the legal estate, cannot do it.

The postscript may, perhaps, be relied on as a declaration of trust by the Plaintiff in favour of the infant. But, even if it is

(1) 29 Car. 2, cap. 3, sec. 7: "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

(2) 19 Beav. 330.

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signed so as to satisfy the *Statute of Frauds*, it amounts to nothing more than an expression of intention.

[They were stopped by the Court.]

North, Q.C., and *Langworthy*, for the Defendants *Johnson* and *Moxon*, and for the infant grandson :—

The Plaintiff's object was to benefit the infant, and she wished to have the transaction kept a secret. For this reason, when *Johnson* instructed his solicitor to prepare the settlement, he professed to act as the absolute owner of the property, and said nothing about the Plaintiff's interest. This was the natural result of her wishing it to be kept secret; and the form of the settlement would have been quite proper if *Johnson* had been the real owner of the property. The mistake arose naturally from the Plaintiff's own wish, and *Johnson* ought not to be saddled with the costs of the action. He ought to be paid his costs, charges, and expenses as trustee, and to be indemnified by the Plaintiff against the lessee's and mortgagor's covenants. The settlement ought, at the most, to be rectified.

[FRY, J.:—Can a voluntary settlement be good in part? If it does not carry out the intention of the settlor, must it not be set aside *in toto*? *Turner* v. *Collins* (1).]

On behalf of the infant we say that a complete trust for him has been declared.

[FRY, J.:—Is the declaration of trust valid within sect. 7 of the *Statute of Frauds*?]

The statute does not apply, for the settlement was a matter of bargain between the Plaintiff and *Johnson*. She found the money; he took on himself the burden of the covenants in the lease and in the mortgage, and so gave consideration for the settlement which was made. He and the Plaintiff were engaged in a common purpose, and if no settlement had been made she would not have been entitled to say "The lease is mine, assign it to me."

But, if the statute does apply, the meaning of sect. 7 is that either the legal or the equitable owner may sign the declaration of trust. *Tierney* v. *Wood* (2) is only a decision that the signature

(1) Law Rep. 7 Ch. 329, 342.

(2) 19 Beav. 330.

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of the equitable owner is sufficient; it does not decide that the signature of the legal owner would not do, though, no doubt, the judgment contains *dicta* to that effect.

But, if the Plaintiff is the only person who can declare a trust, she has done so effectually by the postscript to the letter. The language amounts to a declaration of trust in favour of the infant. The postscript is sufficiently signed by the Plaintiff, inasmuch as it was sent with the letter which was signed by her.

Kekewich, in reply:—

There is nothing to indicate that the signature to the letter was intended to apply to the postscript; there is no sufficient connection between the two documents: *Caton* v. *Caton* (1). There Lord *Chelmsford* said (2) that the cases "establish that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of 'authenticating the instrument,' or 'so as to govern the whole agreement,' to use the words of Sir *William Grant* in *Ogilvie* v. *Foljambe*" (3). *Johnson* ought to pay the costs of the action, for the difficulty has arisen from his not instructing his solicitor properly. He ought to have disclosed the Plaintiff's interest in the property.

FRY, J.:—

The Plaintiff has brought this action to obtain an assignment from the Defendants *Johnson* and *Moxon* of a leasehold house, which is held under a lease granted to the Defendant *Johnson*. The house is subject to a mortgage for £450 created by *Johnson*, and it appears that on the 1st of January, 1877, *Johnson* executed a settlement by which he assigned the house to himself and *Moxon* as trustees upon certain trusts for the benefit of the infant Defendant, with an ultimate trust in *Johnson's* own favour. The Plaintiff's case is that she was the real owner of this house; that it was at her request that *Johnson* took the lease; that she paid £250 towards the purchase-money, the rest of it being raised by

(1) Law Rep. 2 H. L. 127. (2) Law Rep. 2 H. L. 139.
(3) 3 Mer. 53.

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the mortgage; that in making the purchase *Johnson* was acting on her behalf; that she intended the property to be settled upon trusts which she communicated to him, and that in making the settlement which he did actually make he fell into a blunder. Further, it is contended on her behalf that under sect. 7 of the *Statute of Frauds* a valid declaration of trust of land can only be made when it is proved by a writing signed by the person who is by law enabled to declare the trust, and it is said that the Plaintiff, being the beneficial owner of the house, was the only person who was by law enabled to declare a trust of it, and that, as she never did so, no valid trust has been declared. I accede to the proposition that the Plaintiff was the person by law enabled to declare the trust. I am of opinion that *Tierney* v. *Wood* (1) amounts to a decision that the beneficial owner is the person who is by law enabled to declare the trust. Lord *Romilly* there says (2), "That the person to create the trust, and the person who is, by law, enabled to declare the trust, are one and the same, and that, consequently, the beneficial owner is the person by law enabled to declare the trust." I come, therefore, to the conclusion that the Plaintiff was the person by law enabled to declare the trust, and that, unless she did so by some writing signed by her, no valid settlement of the property could be effected. It is said, however, that the settlement was made in pursuance of a bargain between the Plaintiff and *Johnson*, by which he agreed to undertake the legal liabilities of the lease and the mortgage, upon the condition that if he did so the property should be settled upon the infant. Therefore it is said that *Johnson* gave valuable consideration for the settlement, and that his declaration of trust alone was sufficient. I cannot accede to this argument. It amounts to this, that *Johnson* must be taken to have been a co-owner of the house with the Plaintiff, and the proposition that one of two persons, who are by contract jointly interested in land, can declare a trust of it, binding the whole beneficial interest, without the concurrence of the other co-owner, is not, I think, tenable. Then it is further said that the Plaintiff herself has made a valid declaration of trust of the house, and in support of this contention reliance is placed upon a postscript or "supplement" to a letter which, it is admitted,

(1) 19 Beav. 330. (2) 19 Beav. 336.

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was written by the Plaintiff to her daughter-in-law, the mother of the infant. That postscript, it is said, contains a statement that the house is the property of the infant. It appears to have been sent in the same envelope with the letter, though it was written upon a separate sheet of paper. The letter was signed with the Plaintiff's initials. It does not contain, and could hardly have contained, any reference to the postscript. The postscript is not signed at all, and it contains no reference to the letter, except in the introductory words, "I had quite omitted to tell you and *Martin*." It is contended that the postscript is sufficiently signed within the meaning of the *Statute of Frauds*. In my opinion it is not. I think that, as was said in *Caton* v. *Caton* (1), the signature ought to have been so placed as to shew that it was intended to authenticate and refer to the declaration of trust in the postscript. For that purpose it is not necessary that it should be either at the beginning or at the end of the instrument, but it must be placed in such a position as to authenticate and refer to the material part of it. In my opinion the signature to the letter does not satisfy this condition. There is no physical connection between the two documents, except that they are found in the same envelope, and there is no sufficient reference in the one to the other. I therefore hold that the postscript was not signed within the meaning of the *Statute of Frauds*. I should have been indisposed to hold that the language of the postscript amounts to a declaration of trust; it appears to me to be, not a statement of fact, but rather a suggestion of what is to be represented as a fact by the recipient. But I prefer to rest my judgment on the other ground.

There remains the question of costs. If the case had rested upon the *Statute of Frauds* alone, I should have felt some difficulty in giving the Plaintiff her costs. But she has put her case upon what she says is an error in the settlement which has been made, inasmuch as no life estate is reserved to herself, and the ultimate remainder is reserved to *Johnson* himself. I cannot, however, overlook this fact, that it was the common design of the Plaintiff and *Johnson* that the transaction should be represented as the settlement of the grandfather upon the infant. She desired him so to represent it, and she wished her interest in the matter

(1) Law Rep. 2 H. L. 127.

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Judgment.

to be kept secret. The only certain way of keeping a secret is not to tell it to anybody. He did not tell his solicitor anything about the Plaintiff's interest in the property, and this led to the blunder in the frame of the settlement. I cannot say that under the circumstances *Johnson* acted so unreasonably in not informing his solicitor of the real facts of the case that I ought to order him to pay the Plaintiff's costs of the action. I must, therefore, declare that the Plaintiff is entitled to the house free from any claim on the part of the infant. The Plaintiff must indemnify *Johnson* against the lessee's and mortgagor's covenants, and must pay his costs, charges, and expenses properly incurred as trustee (other than the costs of the action), and he and *Moxon* must assign the lease to the Plaintiff, subject to the mortgage. I give no costs of the action up to the trial.

Solicitors for Plaintiff: *Weeks & Son.*
Solicitors for Defendants: *Finney & Bruff.*

FRY, J.
1877
Nov. 8.

BLACKBURN UNION *v.* BROOKS.

[1877 B. 17.]

Evidence by Affidavit—Rules of Court, 1875, *Order* XXXVII., *r.* 1.

Where one party desires the production of a witness for cross-examination, the Court has no power to order an affidavit used on a previous application to be read at the trial.

AT the trial of this action,

Argument.

Cookson, Q.C., and *Rigby*, for the Plaintiffs, proposed to read an affidavit relating to conversations used on a previous interlocutory application. They contended that the Court had, under Rules of Court, 1875, Order XXXVII., rule 1, power to allow evidence by affidavit of a fact, and that power was exercised in *Patterson* v. *Wooler* (1), and ought to be exercised in this case, as the affidavit was already made, and had been made when no doubt

(1) 2 Ch. D. 586.

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the recollection of the witness was more accurate than it could now be. Of course he could be cross-examined.

Argument.

North, Q.C., and *Renshaw*, for the Defendant, declined to consent to this affidavit being read. There was no reason given why the witness should not be produced and examined *vivâ voce*; moreover, if the Defendant desired the production of the witness, the Court had no power to receive the affidavit.

Cookson, in reply:—

The clause of the Order as to the production of the witness relates only to a case of an examination by interrogatories or before a Commissioner.

Judgment.

FRY, J.:—

In my opinion, I have, under the circumstances, no power to order this affidavit to be read. I should have been inclined to make the order on the ground that the affidavit was made soon after the conversations to which it related, and that there has since that period been a considerable lapse of time, were it not for the proviso which is at the end of the rule. Here the Defendant desires to have cross-examination; and therefore, reading the proviso literally, I cannot order the evidence of this witness to be given by affidavit, even supplemented by oral evidence and cross-examination.

Solicitors: *Pritchard, Englefield, & Co.; Shaw & Tremellen.*

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C. J. B.
1877
Nov. 19.

Ex parte ROY. *In re* SILLENCE.

Bankruptcy—Order and Disposition—Lien—Bankruptcy Act, 1869, *s.* 15, *sub-s.* 5.

A horsedealer supplied a customer with a pair of horses, for which she paid £170, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the £170, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses:—

Held, that the horses were in the bankrupt's order and disposition; and that the customer could not enforce a lien on them as against the trustee in bankruptcy.

Statement.

THIS was an appeal from the County Court Judge sitting at *Winchester*.

Mrs. *Roy*, of *Bournemouth*, in June, 1876, purchased from *James Sillence*, a horsedealer of *Otterbourne*, *Hants*, two carriage horses, and paid him £170 for them.

In August, 1876, Mrs. *Roy*, finding the horses not in accordance with the warranty, returned them with *Sillence's* consent, he agreeing to supply her with another pair in place of those returned. Accordingly, two or three days afterwards, *Sillence* sent another pair, but Mrs. *Roy*, finding that they were no better than the former, declined to purchase them. *Sillence* thereupon desired Mrs. *Roy* to use the horses until he should supply her with a suitable pair, according to the warranty of the first pair. Mrs. *Roy* accordingly used the horses, and continued to do so up to and after the 13th of December, on which day *Sillence* was adjudicated a bankrupt.

It then turned out that the owner of these horses and seven others was *Haydon Thomas Aldersey*, who employed the bankrupt to sell, but not to pledge, the horses, and on the 8th of February, 1877, *Edward Douglas Godwin*, the trustee in the bankruptcy, applied to a lady named *Hollis* for the delivery up to him of one

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of the seven horses, as being in the order and disposition of the bankrupt, with the consent of the true owner.

On the 18th of April an order was made by the County Court Judge, directing that the horse claimed by *Aldersey*, and let by the bankrupt to Miss *Hollis*, be handed over to the trustee as having been in the order and disposition of the bankrupt; and further, that if *Aldersey* should within fourteen days agree that the decision on that application, subject to any appeal, should decide the claim of the trustee to eight other horses of *Aldersey* in the order and disposition and reputed ownership of the bankrupt, each side should bear his own costs.

Statement.

Of these eight other horses mentioned in the order, Mrs. *Roy's* were two.

On the 18th of July the trustee served Mrs. *Roy's* solicitors with notice of an application to be made on his behalf for an order to deliver up the horses, they having passed to him as an asset of the bankruptcy; and on the 18th of July the order for delivery up was made.

This was the order appealed from.

Mrs. *Roy* deposed that it was understood between her and the bankrupt that the horses in question were hers, subject to his bringing her a better pair as agreed upon; also that the bankrupt did not tell her that the horses did not belong to him; that she considered they were his; and this evidence was corroborated by Mrs. *Roy's* brother.

The bankrupt and *Aldersey*, in examination, both said that the horses were "lent" to Mrs. *Roy* (the latter said without his consent) until *Sillence* should suit her with another pair.

Finlay Knight, for the Appellant:—

Argument.

The trustee can have no other rights against the Appellant than the bankrupt had. If *Aldersey* had been bringing forward a claim, it might have been a different matter.

The evidence shews there was a contract that Mrs. *Roy* should keep the horses until a better pair were furnished; and this contract the trustee is now seeking to repudiate.

I do not say the property in the horses passed, but the right of possession certainly passed to the Appellant.

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C. J. B. 1877 *Ex parte* Roy. *In re* Sillence. Argument.

Winslow, Q.C., and *George Harris Lea*, for the trustee:—

Mrs. *Roy's* statement is contradicted by the bankrupt, who says he only lent her the horses.

They were *Aldersey's* horses. The bankrupt could deal with them only as *Aldersey's* agent. Assuming that he was authorized to sell, he could not pledge them; that is to say, he could not at law make such a contract as he is said to have made.

The statute makes divisible amongst creditors goods in the bankrupt's order and disposition. Hence the trustee, by force of the statute, is entitled as against both *Aldersey* and the bankrupt, and whatever he is able to recover goes to the creditor.

Mrs. *Roy*, however, says the horses were pledged. If the bankrupt pledged the horses, it could only have been as *Aldersey's* agent, and this, under the *Factors' Act* of 5 & 6 Vict. c. 39, he had no right to do. A factor may sell, and may exchange; but under the statute (sect. 3) he cannot do either in discharge of an antecedent debt. Here the bankrupt owed Mrs. *Roy* £170, and in order to secure that debt, she says, he pledged her the horses. This transaction being invalid under the statute, either way her claim fails.

Hornsby v. *Miller* (1) shews that it is not necessary for a chattel to be on the bankrupt's premises in order to be within his order and disposition. That was the case of a threshing machine, lent out by a firm, which afterwards became bankrupt, to a farmer, and Lord *Campbell* said (2): "If it had always been kept at the bankrupt's house, perhaps that might have suggested the belief that he had it there as agent for the real owner, to be disposed of by himself on commission; but when he let it out for a job, the inference would be that it was his own out and out, and that he received for himself the profits incidental to its being let out. The fact that it was not on his premises is utterly immaterial."

Mrs. *Roy* did not claim her money back. She had no lien on the horses, express or by custom; and this is, in fact, an attempt to set off the value of the horses against the bankrupt's debt, which the bankruptcy law does not allow: *Rose* v. *Hart* (3).

(1) 1 E. & E. 192. (2) 1 E. & E. 202.

(3) 8 Taunt. 499.

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C. J. B.
1877
Ex parte ROY.
In re SILLENCE.

Finlay Knight, in reply:—

It is now admitted that but for this claim of *Aldersey* the horses would belong to the Appellant. Who, then, was the true owner? *Aldersey*. Who was the reputed owner? The Appellant. Then why should the Appellant be concluded by this order of the 18th of April, made in her absence?

This is clearly a case of mutual debts and credits within the authority of *Ex parte Barnett* (1).

Judgment.

BACON, C.J.:—

No doubt there is some difficulty in this case.

It has been described as a hard case upon Mrs. *Roy*, but it is needless to say the hardship of a case cannot affect the decision of the Court one way or the other.

In this instance a man becomes bankrupt. He owes this lady a sum of money. The debt is her debt; and he being liable to pay, sends her a pair of horses, with an understanding that she is to keep them until he can supply her with a better pair. The horses, therefore, remained his. He committed an act of bankruptcy, and the horses which he left with Mrs. *Roy* were in his order and disposition. When he became bankrupt, these horses passed to his trustee to be administered for the benefit of the creditors.

But that is not all. When Mrs. *Roy* is asked about the matter, she sets up this agreement, which, to state it shortly, is an agreement that he should give her a lien upon the horses; and then it is said, she having both the lien and the possession, is entitled to retain the chattels.

But the answer to that is, that the bankrupt could deal with these horses only under the order of his principal. He could not create a lien, because the horses were not his. He was not the owner; but his trustee, by force of the statute, became the owner. How is it possible, then, to contend that this property, which was in the order and disposition of the bankrupt, does not belong to the trustee?

There is no kind of question as to mutual debts and credits.

(1) Law Rep. 9 Ch. 293.

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C. J. B. 1877 *Ex parte* Roy. *In re* Sillence. Judgment.

The case does not present the slightest approach to such a state of things. The trustee has no debt due to him, though the Appellant may be entitled to prove in respect of the £170.

The case is not without difficulty, but I think the difficulty is to be resolved in the way I have mentioned. These chattels were in the bankrupt's order and disposition. If so, the trustee has a right to them, and to have them delivered up to him. Then Mrs. *Roy* says, That right cannot prevail against my lien coupled with my possession. To which the answer is, the bankrupt had no power to enter into any such contract as you allege.

The case must be decided according to law, and in accordance with my view of the law I must dismiss the appeal with costs.

Solicitors: *Winter, Williams, & Co.*, agents for *Aldridge & Sharp, Bournemouth; Adams, Moberly, & Shenton.*

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In re WEDGWOOD COAL AND IRON COMPANY.

ANDERSON'S CASE.

C. A. 1876
V.-C. M. *July* 8, 15.
C. A. 1877 *Nov.* 7, 14.

Companies Act, 1867, *s.* 25— *Paid-up Shares—Contract with the Promoters of the Company—Variation between Memorandum and Articles of Association.*

A syndicate was formed for the purchase of a coal mine from *A.*, with a view to forming a company to take the mine. The mine was accordingly agreed to be conveyed by *A.* to *B.* (who was to establish a company for taking over the mine) in consideration of £66,000, of which £42,000 were to be in paid-up shares of the intended company. The memorandum of association stated that the capital was to be £200,000 in 20,000 shares of £10 each. The articles of association stated that the mine belonged to the persons named in the schedule of an agreement to be executed immediately after the registration of the articles, and that 15,000 paid-up shares were to be allotted to them in the proportions mentioned in the schedule. Soon afterwards *B.* declared himself a trustee for the company, and subsequently to this the agreement referred to in the articles was executed, and by it *B.* declared that he had entered into the agreement for the purchase of the mine on behalf of the persons named in the schedule (being *A.*, the members of the syndicate and their nominees), and that they declared they held the mine in trust for the company; and that 15,000 paid-up shares were to be allotted to them in the proportions therein mentioned. This agreement was registered under the 25th section of the *Companies Act*, 1867. *A.*, besides the shares representing the purchase-money of the mine, purchased 3520 from one of the members of the syndicate, and other persons. The directors issued a large number of debentures on the security of the property of the company, but no other shares were issued except those 15,000 paid-up shares. The company being wound up:—

Held (reversing the decision of *Malins*, V.C.), that the registered agreement was made *bonâ fide* and for good consideration, and was a sufficient contract in writing within the 25th section of the *Companies Act*, 1867; and that there was nothing in the circumstances to estop *A.* from claiming the shares which he had purchased, as paid-up shares.

Whether a memorandum in writing under which a person is to take paid-up shares without any consideration, is a contract within the 25th section of the *Companies Act*, 1867, *Quære*:—

Held, also, that there was no inconsistency between the memorandum and articles of association in the fact that the memorandum stated the capital as consisting of 20,000 shares, and the articles stated that 15,000 of these shares were to be taken as paid up.

Crickmer's Case (1) distinguished.

Statement.

THIS was an application to put Mr. *Alexander Burnes Anderson* on the list of contributories in the winding-up of the *Wedgwood Coal and Iron Company* for 3520 shares of £10 each.

(1) Law Rep. 10 Ch. 614.

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C. A. 1877

ANDERSON'S CASE.

Statement.

The company was formed for the purpose, as stated by the memorandum of association, of acquiring the interest of Mr. *Anderson* and a Mr. *G. Baddeley*, in the coal, ironstone, and other mines and minerals (other than fire-clay, fire-brick clay, and potter's clay), under certain lands known as *Wedgwood Lane Ends* and *Brindley Ford*, in the parishes of *Woolstanton* and *Norton-in-the-Moors*, *Staffordshire*.

On the 28th of March, 1872, *Baddeley*, who was then the lessee of the mines and minerals in question, in writing agreed with *Anderson*, in consideration of moneys paid at various times, to sell him one-half of his interest as lessee of the mines, and further, in the event of a company being formed with the assistance of *Anderson*, with a capital of not less than £40,000, he covenanted to sell and assign to *Anderson* on behalf of such company the other moiety of his interest in the mines for £7500, and also, for another £7500, certain plant and other effects which he had purchased from other persons, and *Anderson* agreed to abide by and carry out these terms, in case of the establishment of a company.

A syndicate was afterwards formed, Lieutenant-Colonel *Innes* and four other persons named *Black*, *McDonald*, *Stafford*, and *Sheridan*, for the purpose of purchasing the mines from the owners and forming a company; and an agreement was entered into, dated the 19th of November, 1872, by which, after reciting that *McDonald* and *Black* had been authorized and empowered by the owners of the collieries to sell the same at a price fixed by the owners, and had associated with them Lieutenant-Colonel *P. R. Innes* and *William Stafford* for the said purpose, who had associated with them a Mr. *Sheridan*, and all parties had agreed to form themselves into a syndicate to purchase the property, and form a joint stock company for the purpose of raising the necessary capital, it was agreed that all the parties would continue their best efforts for the formation of the company and obtaining the capital, and that the net profits which should result therefrom, whether in cash, bonds, or shares, should be equally divided between them.

By another agreement, dated the 29th of November, 1872, it was agreed by *P. R. Innes*, *Sheridan*, and *Stafford*, that in consideration of the services of *Black* and *McDonald*, they would,

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upon the allotment of the bonds proposed to be issued, transfer to them fully paid-up shares to the extent of £12,500 each.

There was a further agreement, dated the 30th of November, 1872, and made between *Anderson* and Colonel *Innes*, by which *Anderson* agreed to sell to *Innes* the mines and minerals for £66,000, to be paid as to £24,000 in cash on completion, and £42,000 in fully paid-up shares in the company to be established by *Innes*, with a nominal capital of £200,000, for taking over and working the mines and minerals. The agreement also required that the company should be established within three months of its date, and that it should be deemed to be established when its capital in debentures actually paid up or subscribed for should amount to £50,000 at the least. It also provided for the appointment of *Anderson* to be manager, at a salary of £1500 per annum.

On the 16th of December, 1872, the memorandum and articles of association of the company, which was called the *Wedgwood Coal and Iron Company*, were registered.

The memorandum of association was subscribed by seven persons for one share each, two of them being Colonel *Innes* and *Charles Black*, and the others being nominees of the other members of the syndicate. It stated the capital of the company to be £200,000 divided into 20,000 shares of £10 each.

The articles of association contained the following clauses:—

"5. In acquiring the leases, estates, mines, minerals, fixtures, plant, machinery, tools, buildings, and other properties, matters, and things, the immediate acquisition of which is specified in the memorandum of association as among the objects for which the company is established, the company shall confirm, and hereby does confirm and adopt, the agreement, dated the 30th of November, 1872, made between *Alexander Burnes Anderson* of the one part and *Percival Robert Innes* of the other part, and shall as speedily as possible after its incorporation obtain a complete legal assignment and transfer to itself of all the premises so to be immediately acquired.

"6. The said premises so to be immediately acquired belonged, and shall be considered to have belonged, to the persons whose names are stated in the schedule to an agreement executed immediately after the registration of these presents in the propor-

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C. A. 1877 ANDERSON'S CASE. Statement.

tions set opposite to their names respectively, and in regard thereto the shares in the company's capital numbered 1 to 15,000, both inclusive, shall be considered as fully paid up, and shall be allotted to and taken by the said persons, or by persons to be nominated by them, in the proportions respectively mentioned in the said schedule.

"7. The board shall, as soon after the incorporation of the company as in their judgment is expedient, offer and issue to the public mortgage debentures of the company to the amount of £75,000, in 3000 debentures of £25 each, and for that purpose shall publish advertisements, and issue circulars, and take and do all such steps and things as in their judgment shall be necessary or expedient."

Article 8 provided that a trust deed should be executed making the debentures a first charge on the property of the company.

"12. The nominal capital of the company shall consist of £200,000, divided into 20,000 shares of £10 each, of which the first 15,000, amounting to £150,000, shall be first issued to the persons and in manner aforesaid."

Article 84 gave the names of the first directors, amongst whom were *Anderson* and Colonel *Innes*.

"88. In the management of the business of the company the directors may, subject to the restrictions hereinafter contained, without any further power or authority from the members, immediately on the incorporation of the company, and notwithstanding that the nominal capital may have been only partially subscribed for, or that none but paid-up shares have been allotted, commence business, and do the following things in the name and on behalf of the company.

* * * * * *

"(*l.*) They may without further authority or sanction of a general meeting or otherwise borrow in the name and on behalf of the company by way of mortgage a sum as aforesaid not exceeding £75,000 in debentures, payable to bearer of £25 each, or in any other denomination they may think proper, and at such rate of interest not exceeding £12 10*s.* per cent. as they may determine upon. The directors may also pay interest on all moneys paid in advance upon the said debentures. They may from time to time,

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by special resolution passed in general meeting, raise or borrow in the name or otherwise on behalf of the company such sums of money as they may from time to time think expedient by way of mortgage or by bonds, bills, notes, or in such other manner as they may deem best."

The first board meeting took place on the 12th of December, 1872, at which directors were appointed, and the memorandum and articles of association adopted. There was another meeting on the 16th of December, at which the directors authorized the issue of debentures to the amount of £60,000, in 2400 debentures of £25 each, bearing interest at 10 per cent., with coupons attached, the principal and interest being charged on the entire property of the undertaking, and provision being made for paying off the whole in seven years by annual drawings. It was also resolved to issue a prospectus offering the debentures to the public.

By an agreement dated the 13th of January, 1873, and made between Colonel *Innes* of the one part and the company of the other part, after reciting the agreement of the 30th of November, 1872, for the sale of the property to *Innes* for £66,000 payable as therein mentioned, and reciting that *Innes*, in agreeing to purchase the said property, was only acting as a trustee for and on behalf of the *Wedgwood Coal and Iron Company, Limited* to the extent and in manner thereinafter appearing, it was agreed that *Innes* should complete the purchase of the said property, and that after he should have the property duly assigned to him he would, as soon as practicable thereafter, assign the same, except the clays therein, to the said *Wedgwood Coal and Iron Company, Limited*, their successors and assigns, and would in the meantime hold the same in trust for the said company, their successors and assigns, for their sole and absolute benefit.

By another agreement also dated the 13th of January, 1873, and made between the company of the one part, and Lord *Suffield* and others, as trustees, of the other part, after reciting the agreement of even date, and reciting that the company were desirous of issuing mortgage debentures under their articles of association, but were unable at present to secure the repayment thereof by a legal mortgage of the said property, owing to their not having acquired the legal estate thereof, it was agreed that the company

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C. A. 1877 ANDERSON'S CASE. Statement.

should, as soon as practicable after *Innes* had assigned the said property to the company, execute a legal mortgage thereof in favour of the said trustees, in order to secure the repayment to the debenture holders of the advances made by them in accordance with the terms of the prospectus issued by the company, and that until such deed should be executed the said trustees should for the purposes aforesaid have a charge upon such property to the amount of the debentures which should from time to time be issued.

By another agreement, dated the 29th of January, 1873, and made between Colonel *Innes*, the other persons named in the schedule, and the company, after reciting the agreement of the 30th of November, 1872, and further reciting that *Innes* had entered into that agreement, not on his own behalf alone, but on behalf of the several persons, including himself, whose names were set forth in the first column of the schedule to the agreement of the 29th of January, 1873, now in statement, and who had mutually agreed to stand and be possessed of and interested in the premises comprised in the recited agreement in the proportions respectively set opposite their names respectively in the second column, and to work the mines and so forth in partnership together, and for that purpose to form a limited company, and reciting the incorporation of the company with a nominal capital of £200,000, divided into 20,000 shares of £10 each, of which the first issue, amounting to £150,000, were to be deemed to be paid up in full, and were to be divided among the several persons whose names were set forth in the first column of the schedule thereto in the proportions and in the amounts set opposite their names respectively in the third column of the schedule thereto, It was witnessed, and *Innes* declared that he had entered into the recited agreement on behalf of and as trustee for the scheduled parties in the proportions set opposite to their names in the second column of the schedule thereto, and that they declared that they were entitled to and would stand possessed of the benefit of the recited agreement, and the mines, upon trust for the company; and it was also agreed that the whole of the first issue of the shares of the company, to the amount of £150,000, which were numbered from 1 to 15,000 inclusive, should be allotted amongst and be held by the several persons parties thereto of the second part in the respective

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Statement.

proportions set opposite to their respective names in the third column of the schedule, and should for all purposes be and be deemed to be fully paid up shares in the company, of which the entire nominal amount had been actually paid to the company.

In the schedule *Anderson* was entered as entitled to 4200 shares as his proportionate amount, and the whole 15,000 shares were allotted proportionally amongst the persons named in the schedule, being, besides *Anderson*, the members of the syndicate and their nominees.

This agreement was registered on the 5th of February, 1873.

The prospectus which was issued in pursuance of the resolution of the board was headed, "Issue of £60,000 in 2400 debentures of £25 each, bearing interest at £10 per cent. in half-yearly payments, secured on the whole property of the company, payable in seven years by annual drawings, with a bonus of 10 per cent. on redemption." It stated that "the present issue of debentures will enable the directors to further develop this well-known property; and a trust has been created by which the whole property and income of the company is assigned to trustees to secure the half-yearly payment of interest, the amount necessary to meet the annual drawings and the bonus; the shareholders of the company take dividends only after the above payments have been made." It then gave the names of the trustees, and the directors and officers of the company, and described the property, and stated the present and expected produce of the mines. It concluded as follows: "The contract for the purchase of the property, dated the 30th of November, 1872, and made between *A. B. Anderson* and *P. R. Innes*, together with the memorandum and articles of association and the deed securing the property to the trustees, together with maps, &c., can be seen at the offices of the solicitors of the company, No. 8, *Old Jewry*."

A considerable number of debentures were taken up by the public, and some were allotted to *Anderson*. He also purchased 1250 shares from *McDonald*, and other shares from other allottees, his total holding amounting to 3520 shares, in addition to the 4200 allotted in respect of his interest in the property acquired by the company. It was in respect of these 3520 shares that it was now sought to put him on the list of contributories.

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C. A. 1877

ANDERSON'S CASE.

The company was wound up voluntarily under a resolution passed in August, 1875.

No shares were allotted except the 15,000 paid-up shares allotted under the agreements.

The case came on for hearing before Vice-Chancellor *Malins* on the 8th of July, 1876.

Argument.

Glasse, Q.C., and *Higgins*, Q.C., for the liquidator:—

This case is in principle covered by *Crickmer's Case* (1). That was an attempt to evade the 25th section of the *Companies Act*, 1867, by saying that it could be satisfied merely by inserting a clause in the articles of association of the company. Here it is attempted to defeat that section by interposing a contract which is altogether without *bona fides*. The object of the arrangement was to obtain capital by means of debentures without any real issue of shares. There was nothing to satisfy the statement in the memorandum of association as to the amount of the capital, and the whole intention of the transactions was to make the company give £150,000 for property which they were entitled to have for £66,000.

[MALINS, V.C.:—I think it must be considered as established that where there is a variation between the memorandum and the articles of association of a company, the memorandum must prevail.]

In that view, the entire balance, after allowing for the £66,000, remains to be called up. The contract of the 29th of January, 1873, cannot be supported as a completed contract, and if so, there is nothing to prevent the full amount of the shares being called up. Sect. 25 of the *Companies Act*, 1867, only applies to *bonâ fide* contracts, and this contract was clearly not *bonâ fide*. In any case the contract could not be valid beyond £66,000, and *Anderson* would certainly be a contributory for the balance. The company were entitled to have the property conveyed to them for £66,000, because *Innes* was a trustee of it for them for that amount, having declared himself such by the agreement of the 13th of January, 1873.

This case does not really differ in principle from such as

(1) Law Rep. 10 Ch. 614; 44 L. J. (Ch.) 595.

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Fothergill's Case (1), and *Leeke's Case* (2). The 25th section can only be satisfied by the acquisition of something of value in respect of which the shares are issued: *Spargo's Case* (3). It must appear that some consideration has been given for the particular shares to entitle them to be treated as fully paid up: *Carling's Case* (4).

Cotton, Q.C., and *Whitehorne*, for *Anderson* :—

The shares for which *Anderson* is now sought to be put on the list of contributories were bought by him at the market price from persons who received them as fully paid-up shares, and he has also shewn his *bona fides* by taking up a large amount of debentures. The intention was that the 4200 shares should be the price of his interest in the property handed over to the company, and the remaining share capital should be disposed of amongst the persons who had been instrumental in working out the scheme, and that the working capital should be provided by debentures, which were to be the first charge on the undertaking. All this was clearly expressed in the articles of association.

With regard to the constitution of the company, there was the utmost possible *bona fides*. The memorandum and articles of association were registered at the same time, and every one took with notice that no shareholder was liable to pay anything upon his shares. The articles of association shew this, and there is nothing morally wrong or inequitable in such an arrangement, provided that it is fully disclosed, as it was in this case. The shareholders are not considered as such, but simply as persons having an interest in any equity of redemption after payment of the debentures.

It is not disputed that, in order to make a valid contract within the 25th section of the *Companies Act*, 1867, there must be a contract in writing deposited with the Registrar of Joint Stock Companies, and registered before the issue of the shares dealt with thereby. That was decided in *Crickmer's Case* (5). The question here is whether there is such a valid contract. The agreed price for the mine was £150,000. If the contract was good, it

(1) Law Rep. 8 Ch. 270.
(2) Ibid. 11 Eq. 100.
(3) Ibid. 8 Ch. 407.
(4) 1 Ch. D. 115; Law Rep. 20 Eq. 580.
(5) Law Rep. 10 Ch. 614; 44 L. J. (Ch.) 595.

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C. A. 1877

ANDERSON'S CASE.

Argument.

could make no difference that the vendors' shares were the only shares, and the rest of the necessary capital was to be provided by issuing debentures. The contract cannot be defeated by allegations as to the insufficiency of the consideration. If valid at all, it is valid for the entire amount of the capital: *In re Baglan Hall Colliery Company* (1); and unless the shares were given, the property still belonged to *Innes* and his associates. *Innes* is in the position of an ordinary vendor, and the fact of his being afterwards connected with the company in no way invalidates the original contract: *Gover's Case* (2). If there were no contract except the articles of association, the shares would have to be taken with the full liability upon them, but this contract makes the shares fully paid shares. The articles of association must then be looked to, and they recognise the liability to pay not only the £66,000, but the entire amount of the share capital. The distinction between this and *Crickmer's Case* (3) is, that in that case there was no contract apart from the articles of association. *Fothergill's Case* (4) was an attempt to allot fully paid-up shares in satisfaction of a liability incurred by signing the memorandum of association. *Spargo's Case* (5), on the other hand, decides that the purchase-money for property obtained by the company is an equivalent for the liability on shares. *Carling's Case* (6) simply decides that shares issued as fully paid up cannot be turned into shares on which there is a liability. It is quite consistent with the policy of the Limited Liability Acts that there should be a limited liability, and at the same time an unrestricted right to participate in profits. The only thing required is that the entire truth should be told, and that has been done in this case. Sect. 25 of the Act of 1867 only requires that some value should in all cases be given for the shares in pursuance of a contract in writing. It is not denied that valuable property was given up to the company, and the Court will not assume that the debenture holders have lost their money. The only ground on which the liquidator can succeed is that of fraud, and if so, there must be some one misled.

(1) Law Rep. 5 Ch. 346.
(2) 1 Ch. D. 182.
(3) Law Rep. 10 Ch. 614; 44 L. J. (Ch.) 595.
(4) Law Rep. 8 Ch. 270.
(5) Ibid. 407.
(6) 1 Ch. D. 115; Law Rep. 20 Eq. 580.

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The debenture holders here knew all the facts, and did not advance their money on the faith of any liability existing on the shares, and so far from *Anderson* having [gained anything by these transactions, it is clear on the evidence that he is a heavy loser.

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J. Pearson, Q.C., and *Nicoll*, for the holders of a large number of debentures, as well as for shareholders and simple contract creditors, supported the same contention with a view to working out a scheme for the reconstruction of the company.

MALINS, V.C.:—

Judgment, V.-C. M.

My views are very clear, and I shall not trouble the learned counsel to reply.

The question I have to decide is, whether Mr. *Anderson* shall be put on the list of contributories of the company for 3520 shares of £10 each, which represents £35,200, and would be a most serious liability if there had been any danger of his being called upon to pay the full amount; but I am very glad to find that there is very little probability of that, and that it may turn out that he will not only not have to pay anything, but may ultimately derive considerable profits from this undertaking. Mr. *Anderson*, in the month of March, 1872, acquired the colliery as to which this question arises from a Mr. *Baddeley*, at a price which, whether large or small, is, in the view I take, very unimportant. I have no doubt whatever, and I do not think Mr. *Anderson* would deny that he bought it with a view and in the expectation of being able to form a company to work what I am perfectly satisfied at the time he believed to be a valuable property. He bought the colliery in March, 1872, which was the time of the great success in the coal and iron trades; it is only just to Mr. *Anderson* to say that he might well be satisfied in 1872 that he had made a valuable acquisition, which he was warranted in selling for a very much larger sum than he gave for it, and I therefore attribute no improper motives to him in entering into the contract of the 30th of November, 1872, to sell the property to the company, that is, to Colonel *Innes*, representing the company, for £24,000 in money and £42,000 in shares, making therefore together £66,000. [His

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Lordship then referred to this document in detail, and continued:—]

On the face of that contract I take it to be perfectly clear that although Colonel *Innes* was not in express terms stated to be acting on behalf of the company, yet the contract was from beginning to end entered into on the formation of the company, and Colonel *Innes* was bound to transfer this property to the company on the £66,000 being paid, and his being released from any liability to pay that sum. This is the only contract referred to in the prospectus of the company. Therefore, upon those two circumstances alone I should distinctly come to the conclusion that Colonel *Innes* entered into this contract as a trustee for the company, and was bound to hand this property over to the company for the sum which he agreed to give for it merely as their agent. About a fortnight afterwards the prospectus was issued and the company was formed, the memorandum of association and the articles of association being dated the 14th and the company registered on the 16th of December, 1872. Now the memorandum of association, which is the great document in all companies, states that the liability of the members is limited, the capital of the company is £200,000, divided into 20,000 shares of £10 each. There is not a syllable as to any shares to be issued as fully paid up, and on the memorandum of association it must be taken that to every one of the shares the liability to pay £10 is attached. The law, I think also, is now perfectly and clearly settled, that if a person takes shares in a company he is liable to pay for them in money or money's worth. Mr. *Anderson*, therefore, was entitled to receive from the company £24,000 in money and 4200 shares, for which he gave value, and to the extent of the 4200 shares no objection whatever can be or has been made or attempted to be made to his receiving fully paid-up shares.

Now, the company having been thus registered on the 16th of December, 1872, in order to remove all possibility of doubt as to the position of Colonel *Innes*, the memorandum of agreement of the 13th of January, 1873, was entered into. [His Lordship read the recitals of that agreement, and continued:—]

Then, without a single share having been subscribed for, the company proceed to issue the prospectus, asking for subscriptions

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to debentures to the amount of £60,000 upon property which only cost in the most favourable view £66,000. There was nothing in the world for the debenture holders to resort to but that property, while those who were associated in these transactions were bound to know that on a trading property it is never allowable or warrantable to borrow more than one half the value. I acquit them of any dishonest motives, but the course taken was incautious and unjustifiable, and even reprehensible. Now, I have to decide whether Mr. *Anderson* is a contributory in respect of the 3520 shares for which he is sought to be put on the list. Against that claim it is said that these shares were issued as fully paid-up shares. I am at a loss to understand that argument. I have pointed out that the memorandum of association is totally silent on the subject of there being fully paid-up shares. Therefore it means that every share is liable to pay £10. [His Lordship then read the 25th section of the Act of 1875, and continued:—]

Mr. *Anderson* is admittedly the owner of 3520 shares. He is, therefore, by the Act of Parliament liable to pay £10 upon every one of them, unless it be otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies. In order to get rid of this difficulty, on the 29th of January, 1873, a most extraordinary document was executed. [His Lordship then referred at length to the agreement of that date, and continued:—]

It is said that there is a contract that these shares are not to be liable to any calls on account of the provisions of clauses 4, 5, and 6 of the articles of association. Articles 4 and 5 adopt and confirm the contract of the 30th of November, 1872; and then comes Article 6, which Mr. *Cotton* and Mr. *Whitehorne* very much rely upon, but which I regard as a pure fiction, not founded on any fact and not justified on any principle of business or fair dealing, because the company were at the time the owners of the property upon payment of the £66,000, and it provides that the property so to be immediately acquired "belongs and shall be considered to belong to the persons whose names are stated in the schedule to an agreement executed immediately after the registration of these presents, in the proportion set to their names respectively." Now I want to know upon what principle the

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company can be entitled to say in the memorandum or articles of association that the property is to be deemed to belong to persons to whom it never did belong, and who had never contributed a single farthing to promote its objects. It is said that Colonel *Innes* was a trustee for the company at large. He is in this document of the 29th of January a trustee for a portion of the shares only, because 15,000 shares are to be considered as fully paid-up shares. If the company be at liberty to treat 15,000 shares as fully paid up, why not the whole 20,000? It is admitted that they could not justify that. That raises the question which I had to decide in *Crickmer's Case* (1), which is, whether it is competent for shareholders to subscribe to a memorandum of association saying the capital shall consist of a certain number of shares, and by a contemporaneous document to say that every share is to be deemed to be paid up in full;—one document making every share liable for £10, and the other saying that they are not liable to one farthing. I can see not one ray of distinction between this and *Crickmer's Case*. There the memorandum of association provided that the capital should consist of £25,000 in 2500 shares of £10 each. That means, by the 25th section of the Act of 1867, 2500 shares, each of which is liable to pay the sum of £10. The articles of association of the same date declared that all the shares should be allotted as fully paid-up shares. Here the words are, "shall be considered as fully paid-up shares." The great difficulty in *Crickmer's Case* was this: the *Caribbean Company* was a clear fraud, intended to deceive; but *Crickmer* was the holder of shares for value, and the great difficulty was whether *Crickmer* was as much liable as the original shareholders would have been to pay £10 on each of these shares; but I was satisfied by the evidence that he was a transferee, with full notice of the transaction, and being such, he was just as much liable as the original allottees of the shares, and as they were liable to the £10 a share, I held he was liable too. I was very clear in the case. The hearing before me is well reported in the *Law Journal* (2), which not only gives the judgment, but some observations made in the course of the argument; for instance, this one (3): "The Vice-Chancellor:—

(1) Law Rep. 10 Ch. 614; 44 L. J. (Ch.) 595.

(2) 44 L. J. (Ch.) 595.

(3) Ibid. 596.

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Is not this the question: Can a company or a number of persons associated together, execute the memorandum of association, saying that the capital of their company shall be £25,000, and on the same day execute and register with that instrument another, namely, the articles, saying the capital shall be nothing?" Then there is another point decided on this case. In my judgment (1) I quoted the judgment of Lord Justice *Giffard* in *In re Baglan Hall Colliery Company* (2): "Taking those sections together, a person who subscribes the memorandum of association is to be held to have agreed to be a shareholder for the number of shares in respect of which he subscribes it, to take them, and to pay a proper consideration for them. The 12th section provides that the memorandum of association can only be altered in certain particulars and in a particular way. If, therefore, the memorandum and the articles are inconsistent, the articles must give way; but there is not any inconsistency between a memorandum, which is general in its terms, and articles which state that the payment for the shares is to be made in a particular way according to the terms of a contract referred to in the articles; nor do I see that payment in kind, according to a subsequent contract with the company, is inconsistent with such a memorandum. If there be a contract of such a nature that on bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal." In part of my judgment (3) I made this observation, which was fully affirmed on appeal: "The register in this instance was strongly calculated to deceive any one who looked at it. At the same time, the whole thing is most extraordinary. To see that nearly all the 2500 shares should have been at first allotted to one man, who, throughout, was for those numerous shares as many times described and named in the register—to find that the columns for the calls on the shares were all vacant, and that for the sum total mentioned as paid on each share, it was £10—to find all that, and to know that it was all utterly false, is indeed astonishing! Every one taking part in the formation of the company must have known the true nature of the transaction. The cases cited really do not govern this one. I think there is a

(1) 44 L. J. (Ch.) 598. (2) Law Rep. 5 Ch. 354.
(3) 44 L. J. (Ch.) 599.

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distinct variance between the memorandum of association and the articles of this company, designed by arrangement for the deception and defrauding of the public; and if the application in this case had been made against an original promoter of the company, instead of a transferee of shares in it, I should have long ago terminated any discussion as to it." I felt the great difficulty to be whether Mr. *Crickmer*, as a transferee, and, as far as I could see, an innocent transferee, was liable to that for which the original allottees would, beyond question, have been liable. That case was very speedily taken to the Court of Appeal; but I have no doubt a shorthand writer's note of my judgment was read to the Court, and that being the case, Lord Justice *James* says (1): "It appears to me that this appeal is perfectly idle; there is no registered contract in writing in this case. The registration of articles of association inconsistent with the memorandum is not the registration of a contract within the meaning of the 25th section of the Act. It must be a contract which shews what shares are to be issued fully paid up, and for what consideration they are to be issued. The appeal must be dismissed with costs." Lord Justice *Mellish* says (2): "I am of the same opinion. The meaning of the articles of association is obscure; but it seems to me to be that the directors shall have power to make presents of paid-up shares. The meaning of the 25th section is that there must be a written contract, by virtue of which the shares are to be issued fully paid up with some person external to the company. That is the thing to be registered, and not a mere contract between the shareholders. Such a clause in the articles cannot be a written contract within the meaning of the Act."

Now what is this contract of the 29th of January which is relied upon? The shareholders contract with themselves that they shall trade and not be liable to the debts of the trade they carry on, and that is gravely argued to be a contract of which the shareholders and creditors have notice. It is a contract to exonerate themselves from the ordinary liability of traders to pay the debts which they incur in the course of their trading. There is no doubt this Act of 1867 was introduced to prevent that, and *In re Baglan Hall Colliery Company* (3) decided only, that although a

(1) Law Rep. 10 Ch. 617. (2) Law Rep. 10 Ch. 617.
(3) Law Rep. 5 Ch. 346.

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man is liable to pay for shares whatever the nominal value may be, he may pay in money or money's worth. In that case they paid in money's worth by giving the colliery as a payment for the shares. I thought, and I think still, that that was delusive as regards the public, and that when a company was formed by memorandum of association, it must, to constitute the capital, have money, and that those who dealt with the company had a right to believe that they could resort to the shareholders so far as the shares were issued for the full amount of capital. To that extent, and that extent only, the decision was carried; and in *Fothergill's Case* (1), there being no payment in meal or malt, Mr. *Fothergill* was held liable for the shares for which he subscribed the memorandum of association. But is this Court to give effect to mere fictions, or to allow parties who enter into commercial transactions to say by one document that they will trade with a capital of £200,000, and in the next that they will trade without a farthing? What is the meaning of the expression, "shall be considered as fully paid up"? Are shareholders at liberty to form a company by one document which is most readily accessible to the public, saying the shares shall be so much in money, and then say that every share is to be considered or deemed as paid up in full? That, in my opinion, however intended, and I have no doubt in the present case it was innocently intended, is a contract only calculated to deceive the public, and deceiving the public is defrauding the public, and is contrary to the spirit and object of these Acts. *Crickmer's Case* (2), in my opinion, goes the whole length of saying that this contract that the shares shall be deemed or considered to be paid up in full is a mere nullity, when it is inconsistent with the memorandum of association. If the intention is to issue fully paid up shares, it is the duty of those engaged in the formation of the company to provide by the memorandum of association that so many shares shall be issued as shares liable to be paid upon, and so many in respect of which there shall be no liability. In default of that, any stipulation, in my opinion, by the articles of association, is entirely ineffective.

Now, then, it is provided that there must be a contract. What is this contract so much relied upon? It was stated to be a con-

(1) Law Rep. 8 Ch. 270. (2) Law Rep. 10 Ch. 614; 44 L. J. (Ch.) 595.

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tract by a certain number of persons holding shares in this company, that they, the shareholders, shall not be liable. They contract with themselves. There is no person outside, as the Lord Justice *Mellish* says in *Crickmer's Case* (1). That is to say, that if a man sells property to a company and enters into a fair and honourable contract that he shall be paid by a certain number of shares, as in this very case Mr. *Anderson* had done, it comes within the meaning of the 25th section. But this contract is merely a declaration by the shareholders in their own favour, that they shall not be liable to pay any calls. In other words, they will carry on trade on the principle that if profits are made they will take the profits, and if losses are sustained they must be borne by the creditors. It was argued very strongly in *Crickmer's Case*, that the articles of association constituted a contract that the shares should be issued as fully paid-up shares. On that I said in reference to this 25th section (2), "I shall make an observation which the facts of this case for the first time call forth, and it is this: the section speaks of a contract. By that is meant an honest, *bonâ fide* contract, valid and effective in law, not one that is void and illegal." That was my view of it, and it was affirmed by both the Lords Justices. Mr. *Whitehorne* seemed to think *Crickmer's Case* turned on the fact of the contract being in the articles of association. I did not decide it on that ground, but I am very clearly of opinion that this contract of the 29th of January, which is registered, is not one iota better than if the very stipulations in that contract were contained in the articles of association themselves. They are in effect so contained, for the contract of the 29th of January merely purports to declare that particular persons are to be the owners, which I have pointed out it was too late to do; it is, in my opinion, analogous to the contract in *Crickmer's Case;* and on the whole case, therefore, I think, without the slightest doubt or hesitation, that Mr. *Anderson* must be put on the list for 3520 shares which he held, and which, therefore, on the exact words of the 25th section, are liable to the full call of £10.

C. A. From this decision *Anderson* appealed. The appeal came on to be heard on the 7th of November, 1877.

(1) Law Rep. 10 Ch. 614; 44 L. J. (Ch.) 595. (2) 44 L. J. (Ch.) 600.

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Anderson appeared in person.

Glasse, Q.C., and *Higgins*, Q.C., for the liquidator.

They referred to *Crickmer's Case* (1), *De Ruvigne's Case* (2), and *Hay's Case* (3).

JESSEL, M.R.:— Judgment, C. A. Jessel, M.R.

This is an appeal from a decision of Vice-Chancellor *Malins*, by which he has put a gentleman of the name of *Anderson* on the list of contributories of the *Wedgwood Coal and Iron Company* for a very large number of shares, which were issued to him, or to persons who transferred to him, as paid-up shares. Of these shares 1250 had been transferred to him by a Mr. *McDonald* under circumstances I am about to mention, and the balance of 2270 had been *bonâ fide* bought by him for money in the market. There were several grounds on which the Vice-Chancellor put this gentleman on the list of shareholders. In the first place, the Vice-Chancellor was of opinion that these shares, though issued under a contract registered pursuant to the 25th section of the *Companies Act* of 1867, were not issued for any consideration; that is to say, he held that the persons who obtained this issue of paid-up shares had no interest whatever in the mine that was sold to the company, though it was stated that they had, and that consequently it was a contract in name only, and therefore without any value. In the next place, his Lordship was of opinion that there was an inconsistency between the memorandum of association and the articles of association, that the memorandum of association having merely said that the company's capital was to consist of so much money allotted in so many shares, and the articles of association having stated that the shares, or rather a large proportion of the shares, were to be issued as paid-up, he considered that was an inconsistency; and he further considered that where there was an inconsistency between the memorandum and the articles of association, even in a matter which the Act of Parliament did not require to be put into the memorandum, the memorandum must prevail over the articles. That being so, he

(1) Law Rep. 10 Ch. 614. (2) 5 Ch. D. 306.
(3) Law Rep. 10 Ch. 593.

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was of opinion that, having regard to the 25th section of the *Companies Act*, which I have already mentioned, there was no sufficient registered contract; and that, having regard to the memorandum of association, in any event the shares must be treated as shares on which the whole amount had to be paid, and he therefore considered that the purchaser of shares in the market having in fact been a promoter of the company, and having had notice of all these facts, was in no better position than the original allottee; and that as regards the other shares he took them from an agent of his own, Mr. *McDonald*, and of course with full notice, and that therefore he must be treated as a person who had agreed to take shares which were not paid up at all, and therefore he was liable to be put on the list of contributories for them. These, as far as I gather, are the reasons given for the judgment of the Vice-Chancellor, from which this appeal has been brought.

Now I have the misfortune to differ from the learned Judge on almost every point, and that being so, I think it only right to say a few words as to the conclusions at which I have arrived, and the ground for these conclusions. In the first place, I am quite satisfied that the persons who claimed an interest in the equity of redemption either had an interest on their own behalf, or as trustees for others, and that it was not correct to say that the contract with which we have to deal was made without consideration. In the next place, I am satisfied that there is no inconsistency between the memorandum and the articles of association. And in the third place, I am not going to alter men's contracts unless the provisions of an Act of Parliament compel me to do so. If a man contracts for paid-up shares with a company, and there is no other contract—that is to say, if there is no previous contract to take shares at all, and the company allots the paid-up shares, and the contract is registered, so as not to be struck at by the 25th section, to which I have referred—it is quite evident that neither party can alter the contract—the company can only insist upon its being performed in the absence, of course, of equitable grounds for setting it aside. If, for instance, the person who has entered into the contract holds a fiduciary position as regards the company, and the contract is not one entered into in such a way as to entitle him to insist upon it, the company may do one of two things: it

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may ask to set aside the contract altogether, and in that case the shares would not be treated as allotted at all, and the consideration (being an insufficient one) would have to be returned to the director or other person holding a fiduciary position; or the company may adopt another course, and may treat the director or other person holding a fiduciary position as trustee for the company of the profit made by the contract, and may take away the profit from him; but in that case again it does not alter the nature of the shares allotted. In a case which came recently before the Court of Appeal (1), the Court being of opinion that the director had improperly obtained allotments to himself of paid-up shares, and the company being in process of winding up, and the shares valueless, the Court charged the director with the value of the shares at the time they were allotted to him, and made him pay that amount by the summary process pointed out by the 169th section of the Act of 1862. But you cannot alter the contract to such an extent as to say, Though you have bargained for paid-up shares, we will change that into a bargain to take shares not paid up, and put you on the list of contributories on that ground. I may say that many of these considerations were pointed out by the Court of Appeal in the case which Mr. *Higgins* referred to of the *Canadian Oil Works Corporation, Hay's Case* (2).

Let us look at what the facts are, and it must not be supposed that I am expressing any approval of what has been done, or that I am about to speak in terms of commendation of the mode in which the company was formed: with all that I have nothing to do. All I have to do is to say whether these shares are to be treated as paid up or not paid up. There was a coal mine to sell; what the value of it was I do not know, mining property is of very variable value—but the result was that a Mr. *Baddeley* and Mr. *Anderson* agreed to buy the coal mine for what appears to have been a comparatively small sum. Then Mr. *Anderson* bought up Mr. *Baddeley's* share, and became, in equity, the owner of the coal mine. In that position of affairs we find an agreement entered into, dated the 19th of November, 1872, in which a Mr. *McDonald* and a Mr. *Black* come upon the scene as parties to it; and it recites that they have been authorized to sell the coal mine at a

(1) *Pearson's Case*, 5 Ch. D. 336. (2) Law Rep. 10 Ch. 593.

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price fixed by the said owners, and have associated with them Lieutenant-Colonel *Innes* and Mr. *William Stafford*, for the said purpose, who have in turn sought and obtained the assistance of Mr. *Sheridan* to carry out the object aforesaid; and all the said parties have agreed together to form themselves into a syndicate to purchase the property aforesaid, and to form a joint stock company for the purpose of raising the necessary capital for such purpose, and to work the said mines to the best advantage and to their utmost capacity, and have each and all contributed heretofore their best abilities, influence, and energies—that is, I suppose, in the management of it; and then it proceeds: "Now, therefore, it is agreed by and between the parties aforesaid that they will continue their efforts for the formation of the company and obtaining the capital therefor, and that all net profits which may result therefrom, whether in cash, bonds, or shares, shall be equally divided between them." That is signed by *Black* and *McDonald*, but it is in evidence, and undisputed, that the other three agreed to it, and in fact it is pretty plain from the next document that they did assent.

Now, what was the effect of that document? It was the formation of a partnership for a limited purpose between those five persons, and that partnership had for its object the purchase of the colliery, the formation of a company, and the selling of the colliery at a profit to the company, as well as the division of the profits between them; it is called a syndicate, but it is really nothing but a partnership. The next document is one of the 29th of November, 1872, which is signed by all five; it is very short, but it carried out an arrangement by which *Black* and *McDonald*, instead of taking two-fifths of the profits, were to take shares, and it is in these terms: "We, the undersigned, hereby agree that in consideration of the introduction and services of *Black* and *McDonald* in and about the formation of the proposed company, based on the *Wedgwood and Lane Ends Colliery*, we will, upon allotment of bonds prepared to be issued, transfer to them respectively fully paid-up shares to the extent of £12,500 each." Therefore the arrangement was, though it is not fully expressed in the memorandum, that *McDonald* and *Black* were to take £12,500 each in fully paid-up shares, and the other three,

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namely, *Innes*, *Sheridan*, and *Anderson*, were to have the benefit of all remaining profits. Then the next thing we find is an agreement signed on the very next day, the 30th of November, 1872, and therefore very nearly contemporaneous, between *Anderson*, who was the owner of the colliery, and Colonel *Innes*, who was one of the partners, but of course subject to the rights of *Black* and *McDonald* in their £12,500 in paid-up shares. By that arrangement *Anderson* agreed to sell to Colonel *Innes* this colliery at a very much larger price than he had agreed to pay for it. There is nothing illegal in that, as far as I know; there was no company then in existence. The bargain was that the purchase-money should be £66,000, and it was to be paid as follows: £24,000 in cash on completion, and £42,000 in paid-up shares of a company to be established by Colonel *Innes* with a nominal share capital of £200,000, for the purpose of taking over and working the said mines and minerals, so that on the face of the agreement there were to be £42,000 in fully paid-up shares at least given to *Anderson;* and besides that, we know that Colonel *Innes* contemplated that there should be at least £25,000 more, because they were to give £25,000 more to *Black* and *McDonald.* Then arrangements were made as to the establishment of the company, and a bargain that *Anderson* should be managing director and should receive a commission on all net profits, and the agreement to remain in force for three calendar months, and so on. Then, on the 30th of November, after the signing of the agreement, what was the position of the parties? Colonel *Innes* had bought, or contracted to buy, this colliery from *Anderson* under those two agreements, by which, of course, he became the agent of the partnership in the purchase. He never denied the agency for a moment, or set up that he was the owner of the property; nor could he have done so in equity. The property was bought for the partnership which consisted of the three, subject to the rights of the other two, namely, *Black* and *McDonald*, to the extent of their £25,000 interest in the purchase. That being the position of Colonel *Innes* and *Anderson*, he might have agreed with *Anderson* the next day that the company should not be formed, or that any other disposition should be made of the property. It turns out that *McDonald* was not an independent partner. *McDonald* was

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agent for *Anderson*, and it seems from the evidence that *Anderson* had agreed to give him £10,000 in shares for his services, and in consideration of that, whatever benefits *McDonald* got were to belong to *Anderson*. That is the effect of it; so that, as between *Anderson* and *McDonald*, the additional shares belonged to *Anderson* on *McDonald* getting £10,000 in shares; and therefore it appears to me that the other five could have dealt as they liked with the property. That being the position of matters, the company is formed, and it is necessary to consider how it was formed. There is the memorandum of association with some other names signed to it, none of whom can be considered as other than members of the partnership, or as their nominees. It was signed by them for one share a-piece. These people were merely nominees if they were not actual members of the partnership; and there were not and never have been any other members of the company than these signers of the memorandum and the holders of these other so-called paid-up shares. The memorandum of association provides that the capital of the company shall be £200,000, divided into 20,000 shares of £10 each.

Now there are provisions in the articles of association shewing that it was intended to issue a portion of the shares as paid up, and the learned Vice-Chancellor was of opinion that those provisions were inconsistent with the provisions of the memorandum, but I cannot find that it is so. Having myself a very large experience in these matters, both at the Bar and on the Bench, I think I can safely say that that is the usual form, and that the fact of the shares being paid up is not usually noticed in the memorandum of association. In fact, I have very seldom seen it noticed, and I am confirmed in my view of the practice by the opinions of both the learned Lords Justices sitting with me. It is stated in the articles of association that part of the shares are paid up, but in neither the memorandum nor in the articles of association is there anything either affirmative or negative as to the mode of payment. It may be by cash payment, or by taking of that which the company consider of equivalent value. Saying that the capital shall be of that amount is not a statement that the actual cash capital to be paid shall be of that amount, and I, for one, do not see any inconsistency. But if there were, why should one of two contem-

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poraneous documents control the other? I am not now speaking of those portions of the memorandum of association which the Act of Parliament requires to be stated in the memorandum. Something might be said on that question, but all the Act of Parliament requires to be stated is the amount of capital for which the company is proposed to be registered divided into shares of a fixed amount. It does not prevent your stating that the shares are to be paid for partially in money and partially in property, or even partially in property or partially in remuneration for services; there is nothing about that in the Act of Parliament.

Where there are two contemporaneous documents executed and assented to by the same persons at the same time (and these really are so substantially, and are therefore to be treated as contemporaneous documents), it appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together, so that if there is any ambiguity in one it may be explained by the other; and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency. Now, when you come to look at the articles of association you find that the 5th article states, after saying what the objects of the company are to be, "In acquiring the leases, estates, mines, minerals, fixtures, plant, machinery, tools, buildings, and other properties, matters, and things, the immediate acquisition of which are specified in the memorandum of association as among the objects for which the company is established, the company shall confirm, and hereby does confirm and adopt the agreement dated the 30th of November, 1872, made between *Anderson* of the one part, and *Innes* of the other part, and shall, as speedily as possible after its incorporation, obtain a complete legal assignment and transfer to itself of all the premises so to be immediately acquired. The said premises so to be immediately acquired belonged, and shall be considered to have belonged, to the persons whose names are stated in the schedule to an agreement executed immediately after the registration of these presents in the proportions set opposite to their names respectively, and in regard thereto the shares in the company's capital numbered 1 to 15,000, both inclusive, shall be

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considered as fully paid up, and shall be allotted to and taken by the said persons, or by persons to be nominated by them, in the proportions respectively mentioned in the said schedule." Now I have little doubt that that document was really prepared, and it is said it was to be executed immediately afterwards, though in fact it was not executed immediately afterwards. The 16th of December, 1872, is the date of the memorandum of association, and the agreement was only executed in the following year. It was executed on the 29th of January, 1873, but though it bears that date, no doubt it was prepared and intended to be executed at the time.

Now, what is the effect of these two articles together? It is not the simple adoption of the contract with Colonel *Innes*, but it is the adoption of that contract subject to the payment of 15,000 shares fully paid up to other people; they take it subject to that payment. That is the arrangement set forth in the articles. That alone is, no doubt, not a sufficiently registered contract within the meaning of the Act of 1867, but it does state fairly that they are going to acquire the property not merely subject to the payment of the money, which is arranged to be paid partly by Colonel *Innes* to *Anderson*, but also subject to giving 15,000 paid-up shares to the persons to be named; and I think no one who read these articles of association could doubt for a moment that that was the fair meaning of them, and no one who read them with any care could avoid being led to inquire who were those persons. That was mentioned in the registered contract. It is dated the 29th of January, 1873, and I refer to it now because it seems to me that, in the natural order of things, it ought to come in here, as it is the agreement stated in the articles of association to be executed immediately afterwards. The agreement recites the contract of November, by which *Anderson* sold to Colonel *Innes*, and then it recites, which is not quite accurate, though in substance it makes very little difference, that *Innes* declared he entered into the agreement as trustee for the parties of the second part in the proportions set opposite their names respectively, and then in those proportions their names are put in the schedule. It is not worth while to notice for this purpose that there was an exception of the fire-clays out of the

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original agreement, which the company were not to have at all; it has a bearing upon one point, but not upon this. *Black* and *McDonald* were to have £12,500 each, and their interest arose in the way which I have mentioned. The other people there mentioned, as I may state shortly, were these: First of all there were the solicitors of the promoters, who were paid, not in money, but in paid-up shares; they were nominees of the promoters, and took a portion of their payment in shares. Then there was Colonel *Innes*, and *Anderson* also, who takes a share; *Black*, who takes a share (he is a promoter); and Mr. *Cooke*, who takes a share, he being a nominee and trustee for *Sheridan*. The result, therefore, is this: that it is simply carrying out the original agreement between the syndicate or partnership by which *Anderson* sold to Colonel *Innes* as trustee for this syndicate or partnership, the only difference being the substitution of the nominees for members of that partnership. That contract was registered, and therefore was not struck at by the Act of Parliament; and the only question is, whether the two instruments which I am going to read, and which it is now necessary to refer to, affect that contract.

Now what happened was this: The company wanted money, of course, and they intended to raise it, not by issuing shares at all, but by issuing debentures; they thereupon—that is, after the formation of the company—issued a prospectus, the promoters being in fact themselves directors. *Anderson* was a director, and so was Colonel *Innes*. They issued a prospectus inviting people to take debentures. I have looked carefully through the prospectus to see if there is anything which in law could be considered as misrepresentation in it, and I must say I cannot find that there is. The issue of debentures was to the amount of £60,000; they were for £25 each, bearing interest at the rate of £10 per cent. per annum. People who lend money at 10 per cent. per annum do not, I suppose, expect that they get a first-rate security, or, at all events, if they do expect it, they are likely to be disappointed. It is "to enable the directors to further develop this well-known property," that is, the *Wedgwood Coal Mine*, and "the property is assigned for payment of the interest." Then, after stating how they are to take their dividends, and so on, it says: "The shareholders of the

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company are to take their dividends only after the above payments have been made." That is the only reference I can find to the shareholders at all, and they come after the debenture holders. Then it states what the property is—valuable seams of coal and ironstone, and that it will pay more than enough to provide for these debentures. It seems to be very sanguine, but still the public were told exactly what it was and what were the estimates which had been made. Then there is this clause: "The contract for the purchase of the property, dated the 30th of November, 1872, made between Mr. *Anderson* and Colonel *Innes*, together with the memorandum and articles of association, &c., may be seen at the offices of the company." Now, it appears to me, if anybody had gone to the office and looked at these documents, he would have had ample notice that this arrangement as to the 15,000 shares was to be carried out. You cannot say it was concealed at all; it was not set forth on the face of the prospectus, but it was not concealed, nor was any representation made on the prospectus that the security offered was any personal liability of the shareholders, or any contribution of share capital. Nothing of the kind was offered to the public, all they were offered was the security of this which they were told was considered by the people who were offering it to be a valuable property, and that they anticipated a revenue from it sufficient to pay their interest eventually; and it does not appear to me, therefore, that there was any misrepresentation in that prospectus.

Well, now, the way they intended to secure the debenture holders was to give them a first charge on the property; but I certainly cannot compliment the draughtsmen on the form of conveyance which was adopted. Instead of stating the facts and making a proper assignment, making the members of the syndicate parties, what they did was this, they make an agreement which, though dated the 13th of January, one must treat as contemporaneous with the other documents, by which Colonel *Innes* of the one part, and the company of the other part, stated that Colonel *Innes*, in agreeing to purchase the said property, was only acting as trustee for and on behalf of the *Wedgwood Coal and Iron Company, Limited*, who were purchasing "to the extent and in the manner hereinafter appearing." I do not admire conveyancing of

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this kind, which is simply stating an untruth instead of stating the facts properly. Of course at the date when Colonel *Innes* consented to enter into the contract, as I have before shewn, he was not acting as trustee for the company, because there was no company in existence: he was merely trustee for the syndicate, and for no one else. Then it goes on to say that Colonel *Innes*, after he has had the property assigned to him, will, as soon as practicable, assign it to the company, except the fire-clays. Of course the whole would belong to the company, the trustee could not keep the fire-clays for himself. It is obvious on the face of it that it is a mere conveyancing contrivance in order to effectuate the next document, which was a memorandum of agreement entered into on the same day, the 13th of January, between the *Wedgwood Coal and Iron Company* and some grand people who are trustees of the company, and then there is a declaration that the *Coal and Iron Company* shall, as soon as practicable, after Colonel *Innes* has assigned the property to them, execute a legal mortgage of the property, with all necessary and usual provisions, to the debenture holders for the advances made to them in accordance with the terms of the prospectus. That is the document which, no doubt, is called in the prospectus the deed securing the property to the trustees. There is no other deed, and that must be the document.

Well, then, it appears to me that when you look at these two documents it is impossible to suppose that any persons intended to vary their rights in the equities of redemption. First of all, Colonel *Innes* alone, as trustee for himself and others, could not transfer to the company that which did not belong to him; even supposing the whole arrangement had been carried out with the full knowledge of the other parties in the syndicate, the only effect would have been that they standing by would not have been entitled to assert any equity against the debenture holders in priority to their debentures. And that was indeed what they intended, but in no way could it change the nature of the transaction even if Colonel *Innes* had intended to do so. He had no power to do it, but I am satisfied that there was no intention of doing it, and that the meaning of the transaction was simply to make a good charge in law on the property in favour of the debenture holders,

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and nothing more. It appears to me, therefore, that there is nothing in the documents, if rightly looked at, to alter the rights of the persons who, as I think, had the substantial interest in the equity of redemption.

That being so, it appears to me there was consideration, valuable in law at all events, given for this contract, and that being so, that the contract was valid, and therefore that the persons who executed the contract were entitled to have the shares allotted to them which were allotted, and that they were properly allotted as paid-up shares.

But assuming that all that is erroneous, and that there was no sufficient consideration, even then I do not see how the Respondent could succeed. The Act of Parliament, no doubt, says the contract shall be registered, but it is only to be "a contract duly made in writing." The contract, if impeachable for want of consideration, or for want of sufficient consideration, must be a contract made in writing, and it complies with the terms of the Act of Parliament if it is registered before the issue of the shares, and then you would be thrown back on the general law, and the general law, as I have before explained, does not make a new contract for a man. If you set aside this allotment of shares, you must set it aside altogether, and then you cannot make the holder of them a contributory; and if you do not set it aside altogether, you must adopt it, and the utmost you can do is, as I said before, that you can take away any profit from the person who has improperly made it. So that it appears to me, even if they had not given (as I think they have given) a valuable consideration, still the moment you have a duly registered contract the 25th section of the Act does not apply.

Well, then, a suggestion was made which was not one of the grounds of the Vice-Chancellor's judgment, that you cannot have a contract under this section with a director or promoter, and observations were made with reference to *dicta* of the late learned Lord Justice *Mellish* in *Crickmer's Case* (1), where he said that the contract must be with some person external to the company. As I understand him, what he meant was this. The case before him referred to the mere registration of the articles of association, that

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is, the articles constituting the company, and it was decided that it was not a sufficient contract. What he meant by "external" was not being a part of the original constitution of the company, but a contract made by the company as a corporation and somebody else. But that somebody else might be a director or promoter. He did not say he must be a person unconnected with the company, but that the person must be external to the company, that is, a person external in the sense I have mentioned as not being one of the members of the company, merely co-operating in the formation of the company. That appears to me to be the only fair interpretation that can be put upon his words which is in my opinion consonant with the law of the case.

On these grounds it appears to me that the judgment of the Court below cannot be supported, and that the appeal should be allowed.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I propose to consider the circumstances of this case and the law applicable to these circumstances under three heads. In the first place, the circumstances which occurred prior to the preparation and registration of the memorandum and articles of association on the 16th of December; secondly, the preparation and registration of these documents; and thirdly, what took place subsequently to the registration of the documents.

Now we have, I think, this fair inference from the evidence in the case, that on the 29th of November, 1872, *Anderson* had contracted to sell, or was under an engagement to sell, the mines and minerals for £66,000, and a syndicate had been formed for the purpose of completing the purchase from *Anderson* and reselling the property to a company to be formed for the purchase of it, and which syndicate were to share the profits on the resale between themselves. On the 30th of November *Colonel Innes*, on behalf of himself and the other members of the syndicate, entered into a formal contract with *Anderson* for the purchase of the property for £66,000; and there can be no question but that the syndicate had a perfect right to enter into the contract to purchase for £66,000 and to sell to a company promoted and formed by themselves for an increased price, and to take the benefit of that profit,

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and to divide it amongst themselves as they thought fit, provided they did it in a proper manner.

One of the essentials of their doing this in a proper manner was that those whom they invited to come forward and be shareholders, or in any way to take an interest in the company, should have full notice of the fact. Then had the persons who were invited to become shareholders, or had others who would under ordinary circumstances have dealings with the company, notice of the profit which the syndicate was about to make for themselves?

To answer this question we must consider the circumstances of the formation of the company. It was started by the memorandum and articles of association alone. There was no prospectus inviting shareholders to come forward, and therefore the operation of the 38th section of the Act of 1867 would be excluded. The memorandum contained, in accordance with what appears to me to have been the usual practice, a mere statement of the amount of capital, the number of shares into which it was divided, and the amount of each share; this is all that the Act of Parliament requires. I certainly do not ever remember myself to have seen a memorandum of association in which, when it has been the intention that a portion of the share capital should be issued in the form of paid-up shares, that intention was referred to on the face of the memorandum.

Now with reference to what has been called an inconsistency between the memorandum of association and the articles of association, I assent to the proposition that if there is an inconsistency between the two, then the memorandum of association would prevail in respect of those matters for which the memorandum is required to provide. For instance, if the memorandum of association stated the capital to be £200,000, and the articles of association stated it to be £500,000, there would be a clear inconsistency and the memorandum would prevail; but I do not see that there is any necessary inconsistency if the articles of association add to the information which is given by the memorandum of association. For instance, supposing the memorandum to have provided that the capital should be £200,000 divided into a certain number of shares of a certain amount, and the articles of association to have added that the capital of

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£200,000 should be divided into A shares and B shares, and that there should be a preferential dividend as far as regards the A, or as far as regards the B shares, I see no inconsistency between the articles of association and the memorandum of association in such a case. Nor do I, in like manner, see any inconsistency between the two because the articles of association mention that certain shares are to be treated as paid-up shares, and state the number of shares to be so treated.

Before commenting on the articles, I must say a few words with reference to the 25th section of the Act, which was considered to have an important bearing on the case by the Vice-Chancellor, though that view was not strongly pressed by the counsel who have argued the case, and I desire to refer to this for the further purpose of making some observations with regard to *Crickmer's Case* (1), upon which reliance has been placed by the Respondent. The wording of the section in question is this, that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." The view taken by the Lords Justices in *Crickmer's Case* was this. Lord Justice *James* says, referring to the contract that was to be registered: "It must be a contract which shews what shares are to be issued fully paid up, and for what consideration they are to be issued." Lord Justice *Mellish* says: "The meaning of the articles of association is obscure, but it seems to me to be that the directors shall have power to make presents of paid-up shares," and when you refer to the articles of association in the case which was then before the Lords Justices, no consideration whatever was expressed, but it was a mere power to the directors to issue certain paid-up shares, and no consideration whatever was expressed in the contract as to the purpose for which these shares were to be so issued. Now let us see how that is in the articles of association with which we have to deal. We have arrived at this conclusion—that there is a syndicate who are to purchase at a price of £66,000, and are to sell to the com-

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pany at a profit. Is that circumstance told? Is that contract stated on the face of the articles, and if it is stated on the face of the articles, is the consideration shewn? First of all we have the 5th clause, which provides, that in acquiring the leases of the estates, mines, &c., the company would adopt the contract of the 30th of November, which had been entered into between *Anderson* and *Innes*. Then that was followed by the 6th clause, which I think, when we read the clause through, states not only the nature of the contract, but the consideration for the contract under which the syndicate took the profits for themselves. It tells us that the property so to be acquired shall be considered to have belonged to the persons whose names are stated in an agreement to be executed after the articles have been registered, and that in regard thereto "the shares in the company's capital numbered from 1 to 15,000 shall be considered as fully paid up, and shall be allotted to and taken by the said persons, or by persons to be nominated by them, in the proportions respectively mentioned in the said schedule." It appears to me that nothing can be more clear than the statement in the articles that the property which had been acquired by the company belonged to those persons who are to receive 15,000 shares of £10 each fully paid up as purchase-money, and that the consideration for the issue of that 15,000 was the making over to the company of the property which at the time the articles were formed belonged to these several parties.

Well, if that be the case, it appears to me that it is not within *Crickmer's Case* (1), where no consideration whatever was stated. Here you have not only the contract in respect to which these 15,000 paid-up shares were to be allotted, but you have the consideration for such issue, and you have the reference to a certain document from which you can at once ascertain who the parties are to whom the issue is to be made. They are to be either those whose names are in the schedule to that document, or persons to be nominated by them; and this further information is afforded by the agreement of the 29th of January, 1873, which was registered after the formation of the company, but before the issue of the paid-up shares. Thus you have these facts published—that the syndicate consisted of five persons in addition to *Anderson*,

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whose names have been already referred to—*Black*, *McDonald*, *Innes*, *Sheridan*, and *Stafford*—and almost immediately after the registration of this memorandum and articles, you have the agreement executed by those persons and registered, stating the proportions in which they are entitled to share in the 15,000 shares. 4200 of these shares were allotted to *Anderson*, in part consideration of the purchase-money to be paid to him. The remaining portions which represented profit were allotted among the several persons who composed the syndicate, or in one or two instances, to their nominees.

Now it is a singular circumstance that no shares were issued at all with the exception of those paid-up shares, nor has any person been sought to be put on the list of contributories with the exception of those who hold from the original allottees of these paid-up shares or derive title from them, so that all the shareholders had full notice of the profit taken by the syndicate. But it is suggested that the debenture holders are injured in this respect, and that they are not bound by what has taken place. The 8th article of association provided for the debenture holders, and all that was provided was that before offering or issuing to the public any debenture a trust or covering deed is to be executed.

What is to be a proper indenture or covering deed appears from the remaining clause, "The debentures to be issued as aforesaid shall be the first charge on the property of the company." Then you have that—which I quite agree with the Master of the Rolls was rather clumsily done—you have got that which was the necessary precedent to the issue of the debentures in the transaction of the 13th of January. For some reason it appeared—and it was so recited on the face of one of the deeds of the 13th of January—that an immediate conveyance from the persons to whom the legal estate in this property was vested could not at once be obtained. Therefore you have, in the first place, the agreement between *Innes* and the company that he would, as soon as possible, procure a proper conveyance of this property, so that it might become vested in the company. That was perfectly right. As soon as the company had paid the purchase-money, that is to say, had paid what *Anderson* was entitled to, and had allotted those 15,000 shares to the syndicate, it was quite right

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there should be either an actual conveyance of the property to the company or a declaration of trust in their favour. It did actually precede the issue of the shares. But the issue of those shares was entirely in the hands of those who entered into the transaction, and therefore there is nothing whatever in the fact that the declaration of trust preceded, although possibly it ought, in strictness, to have been contemporaneous with, the issue of the shares.

Then the second deed was simply an agreement between the company and certain trustees for the debenture holders, by which the company agreed that as soon as the property was made over to them by those trustees it should be made over to the trustees of the debenture holders. It appears to me there was nothing in the circumstances of the case from beginning to end which shewed that this was other than a valid transaction in its inception, and a transaction which has been carried out in a way which certainly, so far as regards the present application to the Court, cannot result in any liability to those who took the shares referred to in the schedule to the contract dated the 29th day of January, 1873, so as to leave them under any liability in respect of those shares.

There is no evidence of any contract whatever on the part of these parties to take any shares otherwise than fully paid up, the consideration for which had been previously expressed. As regards the shares in respect to which it is now sought to place *Anderson* on the list, he purchased in open market from the original parties to that deed of the 30th of January 2270 of those shares. As regards the other 1250 shares he appears to me equally to have purchased them for valuable consideration from *McDonald*, a person entitled to those shares under the agreements of the 29th of November and of the 29th of January, 1873. For these reasons I agree with the conclusion that the Master of the Rolls has arrived at—that this appeal should succeed, and that *Anderson* should not be placed on the list of contributories.

Thesiger, L.J.

THESIGER, L.J.:—

I concur with the other members of the Court in thinking that this appeal should be allowed. But in a case of this importance, especially where we are differing from the judgment of the learned

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Vice-Chancellor, I think it right that I should express my views in my own language on the different points which have been discussed on the appeal. It appears to me that there are involved in the judgment of the learned Vice-Chancellor three questions, all of which have been answered unfavourably to the Appellant in the present case.

The first of these questions is, whether or not the document of the 29th of January, 1873, which it is admitted was registered under the 25th section of the *Companies Act*, 1867, was a real *bonâ fide* contract, or was a mere sham, as seems to have been the view of the learned Vice-Chancellor, having no real facts corresponding to the statements contained in the document. The second question involved in the judgment is, whether or not, assuming the document to be a real *bonâ fide* contract in itself, anything had occurred to prevent or estop *Anderson* from setting up that contract as a bar to his being placed on the list of contributories in respect of unpaid shares. And the third question is, whether or not, assuming the contract to be a real one—assuming there to be nothing to estop *Anderson* from relying upon that contract—it was a contract at all within the meaning of the section to which I have referred.

Now, to take the last point first, the learned Vice-Chancellor in his judgment seems to have proceeded almost entirely (I think I may say entirely) upon the assumption that this case is undistinguishable from *Crickmer's Case* (1). In that view I cannot concur. In *Crickmer's Case* there had been, prior to the registration of the memorandum of association of the company, an agreement made between one of the promoters of the company and a person named *Oliver*, under which, when the company was formed, the whole of the shares, with the exception of the seven shares subscribed for in the memorandum of association, were to be transferred as fully paid-up shares to Mr. *Oliver*, the consideration being the transfer to the company of a concession which *Oliver* had previously obtained. That contract was not registered, and the only mention made of the issue of any shares as paid-up shares was to be found in the articles of association which, as has been mentioned by Lord Justice *Baggallay*, did not state the

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consideration for which those shares were to be issued as paid-up shares. At the same time, in my view of the decision in *Crickmer's Case* (1), it did not proceed on the footing of any question of consideration, but proceeded upon this footing, that the articles of association, which were mere arrangement between the subscribers to the memorandum, confirming the constitution of the company and the mode in which the company was to be constituted and managed, did not in themselves form a contract within the meaning of this section of the Act of Parliament to which I have referred; and although the Vice-Chancellor relies upon, or rather refers to, a *dictum* of Lord Justice *Mellish* as to inconsistency between the articles and the memorandum of association, I do not gather that the judgment in that case was founded upon that inconsistency, but I do gather that it was founded simply and solely upon the footing that there was no contract in the case at all.

Here, however, we find a very different state of circumstances. We find not only that the articles of association set out the fact that a certain number of paid-up shares are to be issued, not only do they set out substantially what was the consideration for the issue of those paid-up shares, but we find also the articles of association followed by a document, which undoubtedly purports to be a contract and a contract made between the company, who are parties to the contract, and the different persons whose names are subscribed to the document; and therefore it seems to me that *Crickmer's Case* has really no proper bearing upon the decision of this case, and that we have what did not exist in *Crickmer's Case*, namely, an actual contract—assuming that it was not a mere sham—which could be registered and which had been registered under the Act of 1867.

There is only one observation that I wish to make with reference to sect. 25 of the Act of 1867. I do not wish it to be supposed that I in any way dissent from the view which was expressed by Mr. *Higgins*, that under the term "contract" used in that sect. 25, the document would not come within those terms where there really was no consideration at all. I think it may very fairly be said—at all events I do not dissent from that view—that

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under the word "contract" is intended a contract binding in law, which of course imports a consideration, although we may not be able to go into the question of what was the value of the consideration.

So much then for the first question involved in the judgment of the learned Vice-Chancellor. Now, let me come to the next question, Was there or was there not a real *bonâ fide* contract, carrying with it and importing a consideration for that contract, or were all these transactions culminating in the agreement of the 29th of January, 1873, a mere sham, without any circumstances corresponding to the statement in the document? I think that the facts (and I do not propose to go into them in detail, because the learned Master of the Rolls has dealt with them) shew that the view of the learned Vice-Chancellor on this point cannot be supported. In March, 1872, *Anderson* seems to have obtained a right in equity to the property in question. He purchases first a moiety of that property, and he had a right, in the event of the formation of the company, to acquire the other moiety of the property on the payment of £7500. As early as November, 1872, negotiations seem to have been set on foot between *Anderson* and Colonel *Innes*, who represented not only himself but other persons classed together with him under the term "syndicate," the object of which was that *Anderson* should sell to this syndicate, and that the syndicate should make such a profit as they could make out of the formation of the company, and a transfer of the mines in question to that company.

The judgment of the learned Vice-Chancellor seems to have proceeded upon the footing that throughout Colonel *Innes*, in becoming the purchaser, or agreeing to purchase the property in question, was simply acting as trustee for the company, and was bound to convey to the company any profits which he might make out of the transaction, or rather was bound, as regards the company, to make no profits. Whatever might be right under the circumstances of the case between the company and Colonel *Innes*, I cannot see anything that corresponds with that idea of the Vice-Chancellor's. It is admitted that there is nothing in the agreement of the 30th November, 1872, to shew that Colonel *Innes* was not purchasing for his own benefit, and when we look to the circum-

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stances and see what had taken place on the 19th and 29th of November, immediately preceding the agreement to which I am referring, it is obvious that Colonel *Innes* had arranged with the other members of the syndicate that he would become purchaser of the property in question, and that he would hold that property not solely for himself, certainly not simply for the benefit of any company, there being at that time no company formed and therefore no obligation between any company and Colonel *Innes*, but for the benefit of himself and of the other members of the syndicate.

We go further and we come to the articles of association. Is not the same idea and the same view patent to anybody who reads those articles of association? I think it must be. I think that the effect of articles 5 and 6 of these articles of association is to shew that inasmuch as *Innes* had made this purchase for the benefit of himself and the other members of the syndicate, they had determined that their profit should be obtained from the allotment to them when the company was formed of 15,000 shares, making a nominal £150,000 of money, which of course might be divided between the syndicate in such proportions as they might think proper, or might be paid by them to any other person who had assisted them in the carrying out of the promotion of the company. And finally, we have the agreement of the 29th of January, 1873, which is quite consistent with the articles of association, and seems to carry out the intentions of the parties from the 19th of November, 1872, for the agreement provides that these 15,000 shares should be allotted in certain proportions to the members of the syndicate, and to certain other persons who, according to the evidence in the case, had given a certain amount of assistance to the members of the syndicate. Therefore, upon this question of fact, the conclusion at which I have arrived is that the agreement of the 29th of January was a real *bonâ fide* transaction. I have not to deal with the question of whether it was such a transaction as I should feel disposed to commend.

The only remaining question is, Can we find anything in the documents of the 13th of January, 1873, which would make it inequitable to set up, or in any way prevent or estop the Appellant from setting up, that agreement of the 29th of January, 1873,

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which has been registered under the Act? Now, I must say that, speaking for myself, I could have wished to see the documents drawn up in January, 1873, made more explicit; but I cannot concur in the view that it is the draftsmen who were to blame. I cannot help thinking that those who were engaged in the promotion of this company, those who were occupied in the obtaining of persons who would advance their money on debentures, might have been a little more explicit, might have stated what was the real nature of the transaction, and in that way, at all events, without imposing upon them the trouble of going to the place where the articles of association are registered, might have given the trustees for those who subscribed their money full information of what was the nature of the transaction.

On the other hand, I feel bound to say, in fairness to the gentlemen promoting this company, that we do not find in the prospectus issued for the purpose of inviting persons to take debentures any misrepresentation; nor do we find any representation beyond this—that they would have the security of the property, which security undoubtedly they had. And also it seems to me that, to a certain extent, the statements made in the document of the 13th of January, 1873, may be taken to represent a correct state of facts. In one sense, at that date Colonel *Innes* was holding that agreement which he had made in November, 1872, as trustee for the company; but trustee under what circumstances and of what company? Not a trustee who was bound to let the company have the property simply on the footing of the £66,000 to be paid, but of a company one of the very incidents of the constitution of which was this—that to those who had become owners or interested in the property, to those who were about to transfer the property to the company, there should be a transfer of 15,000 shares fully paid up; and the debenture holders, or proposed debenture holders, had nothing to do but to go to the office where the articles of association were registered, and see for themselves what was the nature of the transaction, what were the shares to be issued fully paid up, and in that view, then, they could not be in any way deceived. At all events, whatever view may be taken on the question, whether or not these agreements should have been framed in the way in which they have been framed, I cannot myself find anything in

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them which would justify any Court in holding that they prevent or estop *Anderson* from saying that he had bargained to take, or rather had taken, either by transfer or through the hands of his nominee *McDonald*, paid-up shares; and in respect of those shares demanding that he should not be placed on the list of contributories.

Under these circumstances I think that the appeal should be allowed, and that *Anderson's* name should be removed from the list.

Solicitors for the Liquidator: *Mercer & Mercer.*

C. A. 1877 *Nov.* 16.

BUTLER *v.* BUTLER.

[1875 B. 17.]

Breach of Trust—Liability of one Trustee—Insufficient Security—Sale in Absence of Cestuis que Trust.

Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the Defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due from him to the Defendant. The other trustee filed a bill against the Defendant, alleging that the security was insufficient, and asking that the security might be realized, and that the Defendant might make good any deficiency:—

Held (affirming the decision of *Fry*, J.), that the Plaintiff had no equity to make his co-trustee primarily liable; and that the Court would not direct a sale of the property in the absence of the *cestuis que trust.*

Statement.

THIS was an appeal from a decision of Mr. Justice *Fry* (1).

John Butler, *Walter Butler*, and *Jane Sarah Butler*, were the trustees and executors of the will of *John Butler*, deceased, and as such held a considerable sum of New £3 per Cent. Annuities in trust for the testator's children and grandchildren. The will authorized the trustees to invest the funds on mortgage.

Walter Butler owned land near *Croydon*, and agreed to sell it to a builder named *Arnold*. The trustees advanced to two persons named *Fennell* and *Stead*, who were associated with *Arnold*, a sum of money amounting to £5850 out of the trust funds, on mortgage

(1) 5 Ch. D. 554.

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of the land formerly belonging to *Walter Butler*, and the houses built thereon by *Arnold*, *Fennell*, and *Stead*. Of this money, £4858 was received by *Walter Butler* from *Arnold*; as to £1250 of it in payment of the purchase-money for the land; as to further part in repayment of advances made by *Walter Butler* to *Arnold* to assist him in building the houses; and as to the residue in or towards satisfaction of other sums due from *Arnold* to *Walter Butler*.

Statement.

In January, 1875, *John Butler* filed a bill against *Walter Butler* and *George Huntley* (who had been appointed a trustee in the place of *Jane Sarah Butler*), alleging that he was induced by the solicitations of *Walter Butler* to make the advances, and only agreed to an advance on condition that *Walter Butler* should be personally liable for repayment, and that the mortgaged houses were a very insufficient security for the debt. The bill prayed that the mortgage securities might be realized, and that *Walter Butler* might be decreed to make good to the estate of the testator, if necessary, the principal moneys and interest due on the mortgages.

The Defendant *Walter Butler*, who was a solicitor, denied that he had given any guarantee; and alleged that the Plaintiff was well aware of the business relations between the Defendant and *Arnold*, and knew how the mortgage money was applied by *Arnold*; that the Plaintiff was himself a solicitor, and was well acquainted with the value of the property at *Croydon*; and he denied that the property mortgaged was an insufficient security.

Evidence was gone into on both sides, the result of which was that the Plaintiff failed in proving that any guarantee had been given by the Defendant *Walter Butler*; and that the Plaintiff was proved to have known that part of the mortgage money would go to *Walter Butler* in payment of the purchase-money for the land, but there was no proof that he knew of the other sums of money due from *Arnold* to *Walter Butler*.

Mr. Justice *Fry* held that the Plaintiff failed in establishing his claim to relief, and dismissed the bill with costs. From this decision the Plaintiff appealed.

J. H. Palmer, Q.C., and *Nugent*, for the Appellant:—

Argument.

We rest the Plaintiff's claim to relief, not on the guarantee alleged to have been given by the Defendant, as the evidence is

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not conclusive on that point, but on the equity which arises out of the transaction. No trustee is allowed to derive a personal benefit from an advance of trust money; and if he does, he is bound not only to indemnify the *cestui que trust*, but also his co-trustee, against any loss that may occur. It is said that the Plaintiff knew how the money was applied, but that is not strictly true, for he only knew of the application of such part of it as was due for purchase-money, and was in fact a lien on the property. But however that may be, a trustee is not estopped by his knowledge of the breach of trust when it occurred from calling upon his co-trustee, who has committed the breach of trust, to make good the fund and to account for the profit which has been made by it: *Fuller* v. *Knight* (1); *Baynard* v. *Woolley* (2); *Fyler* v. *Fyler* (3); *Earl Powlett* v. *Herbert* (4). *Raby* v. *Riderhalgh* (5), which was cited by the learned Judge in the Court below, is no authority against the liability of a trustee in such a case as the present. The fact that the *cestuis que trust* are not parties is no objection to the suit: *Franco* v. *Franco* (6).

Bristowe, Q.C., and *W. W. Cooper*, for the Defendant, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

It appears to me that this bill is entirely misconceived. The case made by the bill, if it can be proved, is a case of personal indemnity—an obligation by the Defendant to make good any loss which may arise from the investment in question, whether it arises from the securities proving ultimately insufficient, or otherwise. That was the case which the bill was intended to raise, and which, in the judgment of the learned Judge (which in that respect has not been questioned by the Appellant), entirely failed; that is to say, the Judge was of opinion, and that has been submitted to, that no such promise was made as was averred in the bill, and he was of opinion that the substance of the case had failed entirely. That is also my opinion.

(1) 6 Beav. 205.
(2) 20 Beav. 583.
(3) 3 Beav. 550.
(4) 1 Ves. 297.
(5) 7 D. M. & G. 104.
(6) 3 Ves. 75.

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Then it is put upon this, that the money was lent by a breach of trust to which both the Plaintiff and the Defendant were parties; and therefore, being both parties, each of them would have a right to have the trust moneys made good. But the suggestion that there was a breach of trust at all is a mere suggestion made at the bar for the purpose of endeavouring to obtain some relief in a suit which has entirely failed for the purpose for which that suit was originally instituted. The whole allegation in the bill is against the notion that there was any breach of trust. It is true that indirectly the trust moneys found their way into the hand of one of the trustees, that is to say, in payment of a debt due from the mortgagor; but the allegation in the bill is that the Plaintiff and the Defendant being authorized to make an investment upon a security of the kind in question, the Plaintiff, who alleges that he has great personal experience and knowledge in the value of the land and buildings, arrived at the conclusion, after personal examination and inspection of the property, that a certain sum of money might be fairly and properly lent upon that security, and thereupon the security was taken for the money. There is no allegation of any breach of trust in that. All the cases which have been referred to, so far as they could affect the case of breach of trust, have no bearing upon the case before us. I agree with what Mr. Justice *Fry* says in his judgment, that you cannot go into remote consequences for the purpose of sustaining a bill of this kind. If two trustees will sell out stock and hand the money over to one, no doubt that one can be made to repay, but the indirect benefit which a creditor gets from trust moneys being lent to his debtor upon insufficient security is too remote, unless the thing was a fraudulent scheme, which is not alleged here. If there were a wilful lending upon insufficient security, that might raise a different question. Nothing of that kind is raised here. All that is said is that in the result some of the moneys lent upon insufficient security were paid in discharge of a debt due from the mortgagor to one of the trustees. That certainly does not come anywhere near any of the cases which have been referred to, and is not the case made by the bill, or intended to be made by the bill.

I am therefore of opinion that the Plaintiff has wholly failed

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C. A. 1877 BUTLER v. BUTLER. Judgment, James, L.J.

upon that part of his case. I also agree with what Mr. Justice *Fry* is reported to have said, that with regard to the question of a trustee filing a bill to enforce a security, it is very difficult for one trustee to file a bill against another trustee to realize that security in the absence of the *cestuis que trust*, who might prefer to allow the money to remain. They have a right to be heard upon that question. I am of opinion that the appeal fails, and ought to be dismissed with costs.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. Mr. *Hinde Palmer* has pressed very strongly upon us that unless we allow this appeal and make a decree to the effect which he has asked, we shall be running counter to the authorities by holding that a trustee can commit a breach of trust with impunity. That is not the case. If there has been a breach of trust in this case, it cannot be committed with impunity, because there are ample means by which that can be rectified. It was quite open to the Plaintiff in this case, in a suit properly constituted, to have alleged the insufficiency of this security either with or without an alleged breach of trust, and the refusal of his co-trustee to call in the security and to see that the moneys were placed out in proper investments. It was open to him to have filed a bill for that purpose. But if the bill so filed had contained such allegations as are contained in the bill before us, and are to be found in the affidavit of the Plaintiff himself, and have been admitted in the course of the argument, any breach of trust committed must have been a joint breach of trust, and immediately following a decree for carrying the trusts of the will into execution there must have been a direction for realization of the securities against the two trustees, and an order against the two to make good the loss. I can quite understand why the gentleman who framed this bill did not think it worth while to raise the question in that form. In the cases which have been referred to there was an actual receipt of the trust moneys by one of the two trustees, as in the case of *Baynard* v. *Woolley* (1). Here there was a loan made to *Arnold* originally upon securities, which, whether they were or not of ample value, were within the trust for

(1) 20 Beav. 583.

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investment. Out of that sum of money no doubt a portion ultimately found its way to the other trustee, who was a vendor. But that is a distinct and different case from *Baynard* v. *Woolley* (1). The other cases were suits by the trustees, or the *cestuis que trust*, or the representatives of the *cestuis que trust*, for the purpose of enforcing restoration from the trustees who had committed a breach of trust. It seems to me that we are not in any way running counter to the authorities in refusing this appeal. The bill is of a novel character, and it appears to me that it is entirely misconceived.

Judgment, Baggallay, L.J.

THESIGER, L.J.:—

Thesiger, L.J.

I also think that the bill is misconceived. The Plaintiff cannot put his case as regards the facts higher than this, that he and the Defendant, being co-trustees, have advanced trust funds upon a security authorized by the instrument creating the trust, but which either was at the time when it was taken, or has since proved to be, inadequate to secure the fund advanced; and that the Defendant has, more or less directly, by virtue of that advance, having certain business transactions with the person to whom the money was paid, derived a benefit, the Plaintiff, although perhaps not aware to the full extent what that benefit was, yet, at all events, being aware that some benefit was derived by his co-trustee.

Those being the facts, I cannot see any ground either of principle or authority upon which this bill can be supported. Several cases have been cited by Mr. *Hinde Palmer* on behalf of the Plaintiff, but when those cases are looked at they seem to be clearly distinguishable. All of them, with the exception of *Fuller* v. *Knight* (2), were cases in which the Plaintiff and Defendant being co-trustees had misappropriated a portion of the trust funds, and either the trust property itself or the proceeds of that trust property had found their way into the hands of the Defendant. Under those circumstances a clear equity arose enabling the Plaintiff to recover either the trust property or the proceeds of that trust property from his defaulting co-trustee. The case of *Fuller* v. *Knight* was a little different, but is equally distinguish-

(1) 20 Beav. 583. (2) 6 Beav. 205.

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C. A. 1877 BUTLER v. BUTLER. Judgment, Thesiger, L.J.

able from the present case. There a trustee had connived with a *cestui que trust*, being tenant for life, in the appropriation by the tenant for life of certain trust funds to which that tenant for life was not entitled. Subsequently certain funds belonging to the tenant for life had come into the hands of that trustee, and he claimed to hold those funds for the purpose of reinstating the fund which had been misappropriated, in other words, putting an end to the breach of trust which had been committed. The tenant for life having executed a creditors' deed, the trustees of that creditors' deed filed a bill in order, if possible, to obtain from the trustee payment of the funds of the tenant for life which he held for the purpose I have stated; but their bill failed. The mere statement of the facts of that case shews how totally distinct it is from the present.

Those being the only authorities which are cited on behalf of the Plaintiff in support of this bill, what ground is there upon which it can be supported? I can see none. The only one suggested is that because the Defendant has in respect of this advance, upon a security authorized by the will by which the trust was constituted, obtained a benefit, therefore the Plaintiff, who has never been called upon yet to make good any loss of trust funds, is entitled to be indemnified by his co-trustee. I cannot find any principle upon which that contention can be supported.

Solicitors for Plaintiff: *Randall & Angier*, agents for *J. M. Head, Reigate.*

Solicitors for Defendant: *Saffery & Huntley.*

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Ex parte CROSBIE. *In re* BEDELL.

C. A. 1877 Nov. 22.

Proof—Debt contracted after Notice of Act of Bankruptcy available for Adjudication—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

The expression "notice of any act of bankruptcy available for adjudication" used in sect. 31 of the *Bankruptcy Act*, 1869, means notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered.

Therefore a creditor who contracted a debt with a bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of the petition upon which the adjudication is made is not precluded by sect. 31 from proving under the adjudication.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 19th of October, 1874, *Charles Bedell*, a wine merchant, filed a liquidation petition. The first meeting of the creditors was held on the 17th of December, 1874, when it was resolved by the proper majority, 1, that a composition of 7*s.* 6*d.* in the pound should be accepted in satisfaction of the debts due to the creditors from *Bedell*; 2, that the composition should be payable in three instalments—viz., 4*s.* in three months, 2*s.* in six months, and 1*s.* 6*d.* in nine months from the date of the registration of the resolutions, the last instalment to be guaranteed by *H. P. Gilbey*, such guarantee to be filed with the resolutions; 3, that the composition be secured by the promissory notes of the debtor, to be dated on the day of the registration of the resolutions, and to be delivered by the debtor to *James Glegg* for the use of and to distribute to the several creditors; 4, that until payment of the composition the debtor should carry on his business under the inspection of three persons, who were thereby appointed inspectors, and that a deed of inspectorship should be prepared and executed for the purpose. These resolutions were confirmed at the second meeting of the creditors on the 31st of December, 1874, and were registered on the 26th of January, 1875. *Gilbey*, on the 21st of December, 1874, executed the guarantee of the last instalment, and the guarantee was filed with the resolutions. An inspectorship deed was executed on the 8th of March, 1875.

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Ex parte CROSBIE. *In re* BEDELL.

Statement.

The first instalment of the composition was duly paid by the debtor, but he made default in payment of the second. On the 1st of October, 1875, two creditors whose names had not been inserted in the debtor's statement of affairs, and who were therefore not bound by the composition, presented a bankruptcy petition against him, founded upon his non-compliance with a debtor's summons which they had served upon him; and on the 14th of October, 1875, he was adjudicated a bankrupt, and *William Crosbie* was appointed trustee of his property. Default was made in payment of the third instalment of the composition, and *Gilbey* was compelled to pay it (*vide Glegg* v. *Gilbey* (1)) in respect of £2426 11*s.* 9*d.* For the sum thus paid by him *Gilbey* tendered a proof in the bankruptcy. The trustee rejected the proof, "on the ground that the liability referred to in your proof was contracted by the bankrupt after the committal of an act of bankruptcy of which you had notice, and that you have no right of proof until the creditors who were bound by the composition have received the last two instalments of the composition." The Registrar ordered the proof to be admitted. The trustee appealed.

Argument.

Winslow, Q.C., and *Northmore Lawrence*, for the Appellant:—

Sect. 31 of the *Bankruptcy Act*, 1869, applies, and it prevents *Gilbey* from proving. The bankrupt's liability to indemnify him arose out of the inspectorship deed, and *Gilbey*, when the liability was contracted, had notice of the act of bankruptcy committed by the filing of the liquidation petition, which was then an act of bankruptcy available for adjudication. Though an adjudication cannot be founded upon an act of bankruptcy committed more than six months before the presentation of the petition, yet the title of the trustee can relate back to an act of bankruptcy committed within twelve months before the order of adjudication: *Bankruptcy Act*, 1869, sects. 6, 11; and the intention of sect. 31 was that a creditor should not be able, after he has had notice of an act of bankruptcy which divested his debtor's property, to enter into a contract with him, and afterwards enforce against the divested property a liability arising out of that contract. *Ex parte Dewhurst* (2) shews that, after notice of a bankruptcy only a *bonâ*

(1) 2 Q. B. D. 6, 209. (2) Law Rep. 7 Ch. 185.

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fide payment for value by the bankrupt can be sustained. If any limitation at all is to be placed upon the generality of the words of sect. 31, they can only be limited to acts of bankruptcy to which the title of the trustee can relate back. This view is supported by *Paull* v. *Best* (1), a decision upon the effect of sect. 129 of the *Bankrupt Law Consolidation Act*, 1849. Here the liquidation petition was filed within a year before the order of adjudication. At any rate *Gilbey* cannot prove until the creditors who are bound by the composition have received 7*s.* 6*d.* in the pound.

[JAMES, L.J. :—How can any distinction be made between the creditors?]

De Gex, Q.C., and *Crump*, for *Gilbey*, were not heard.

Judgment, James, L.J.

JAMES, L.J. :—

I think we must put a reasonable construction upon the words of this section. It could not have been intended that in any subsequent bankruptcy any number of years afterwards proof could not be made by any creditor who, when his debt was contracted, had notice of some act of bankruptcy which had been committed by the debtor. I think the Legislature must have intended to put some limit upon it, and that the words "notice of any act of bankruptcy available for adjudication" must mean notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered; that is, any act of bankruptcy upon which that adjudication might have proceeded. If, therefore, the act of bankruptcy be, as it is in the present case, one committed more than six months before the presentation of the petition on which the adjudication was made, the creditor who had notice of it is not prevented from proving.

Baggallay, L.J.

BAGGALLAY, L.J. :—

I am of the same opinion. If the words "available for adjudication" had been omitted, the effect of the provision would have

(1) 3 B. & S. 537.

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been much more general, and I think that these words were inserted in order to introduce this limitation—that the act of bankruptcy must be one which would have been available for the making of the particular adjudication.

Judgment, Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. I think that if the Appellant's contention is right a considerable number of words would have to be added to the section, whereas, on the other view of it, the section may be read intelligibly without any addition to its words. The section is dealing with the question what debts may be proved in a particular bankruptcy. It says that demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and then it goes on to say, "and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice." Then it says that, with these exceptions, "all debts, present and future, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication shall be deemed to be debts provable in bankruptcy." The section is dealing throughout with the particular bankruptcy, and I think the words "available for adjudication" must necessarily mean available for the making of the particular adjudication under which the proof is made.

The appeal was dismissed with costs.

Solicitors for Trustee: *Lewis, Munns, & Longden.*
Solicitor for Creditor: *V. I. Chamberlain.*

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Ex parte STEPHENS. *In re* LAVIES.

C. A. 1877 Nov. 22.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Disclaimer of Lease by Trustee—Right to remove Fixtures.*

After the trustee in a bankruptcy has executed a disclaimer of a lease vested in the bankrupt, he is not entitled, even though he be in possession of the leasehold premises, to remove the tenant's fixtures.

The effect of the disclaimer is to give the landlord an absolute title to the fixtures as from the date of the order of adjudication.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

By an indenture dated the 28th of September, 1871, *J. F. Williams* demised to *W. H. de Carteret* and *Joseph Lavies*, their executors, administrators, and assigns, a messuage and premises known as No. 71, *Jermyn Street*, together with the fixtures then in, upon, or belonging to the demised premises, for the term of 30½ years, from the 29th of September, 1871, at a rent commencing with £416, and ultimately increasing up to £1400. The interest of *De Carteret* under the lease afterwards became vested in *Lavies*, and he carried on upon the premises a club called the *Universities and New Athenæum Club*. In January, 1876, he filed a liquidation petition. The creditors resolved upon a liquidation by arrangement, and appointed *James Waddell* trustee. He continued for some time to carry on the business, but ultimately, finding it unprofitable, he in March, 1877, applied to the Court for leave to disclaim the lease. The executors of the landlord (who was then dead) were served with notice of the application, and on the 15th of March an order was made that the trustee should be at liberty to disclaim. On the 22nd of March he executed a disclaimer in writing, whereby he gave notice to the executors that, in pursuance of the order of the 15th of March, he thereby disclaimed "all right, title, and interest which, as such trustee as aforesaid, I may have or be entitled to" under the lease. Before this the furniture and tenant's fixtures on the demised premises had by the trustee's direction been advertised for sale by auction on the 13th of March. On the 10th of March the executors gave notice

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C. A. 1877 *Ex parte* STEPHENS. *In re* LAVIES.

to the trustee that they claimed the fixtures, and he on the 12th of March gave an undertaking to withdraw them from the sale, and they were accordingly not sold. On the 23rd of March the trustee, being still in possession of the premises, caused the tenant's fixtures to be severed and removed from the premises. The executors thereupon applied to the Court for an order declaring that the fixtures thus removed were the property of the executors, and that they had been wrongfully removed, and for an order that the trustee should deliver up the articles removed or pay their value to the executors, and pay damages for the injury done to the freehold in the removal. The Registrar held that the executors were entitled only to such (if any) of the removed articles as were landlord's fixtures (as to which an inquiry was directed), and with that exception he refused the application. The executors appealed.

Statement.

Argument.

Winslow, Q.C., and *J. Linklater*, for the Appellants:—

By virtue of sect. 23 of the *Bankruptcy Act*, 1869, the disclaimer of a lease by the trustee operates as a surrender of the lease on the day of the date of the order of adjudication, or, in the case of a liquidation, the date of the trustee's appointment. Therefore, as soon as the disclaimer was executed, the trustee became a mere trespasser on the property, and a trespasser as from the date of his appointment. It is well settled that a tenant must exercise his right to remove fixtures during his term, or during such time after its expiration as he can be considered to be still in possession of the property as tenant. After that he has no right to remove them: *Lyde* v. *Russell* (1); *Minshall* v. *Lloyd* (2); *Weeton* v. *Woodcock* (3); *Pugh* v. *Arton* (4); *Storer* v. *Hunter* (5). In *Stansfeld* v. *Corporation of Portsmouth* (6), the decision turned upon the special language of the contract. In the *London and Westminster Loan and Discount Company* v. *Drake* (7), and in *Saint* v. *Pilley* (8), though it was held that a tenant who had mortgaged fixtures could not, by

(1) 1 B. & Ad. 394.
(2) 2 M. & W. 450.
(3) 7 M. & W. 14.
(4) Law Rep. 8 Eq. 626.
(5) 3 B. & C. 368.
(6) 4 C. B. (N.S.) 120.
(7) 6 C. B. (N.S.) 798, 810.
(8) Law Rep. 10 Ex. 137.

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a voluntary surrender of his term, defeat the rights of his mortgagee, yet the general principle is recognised that the tenant cannot remove the fixtures after the expiration of the term. Upon the execution of the disclaimer by the trustee the landlord's title was complete: *Ex parte Ditton* (1). The terms of the disclaimer are as wide as they well could be.

Finlay Knight, for the trustee:—

The executors had notice of the application for leave to disclaim; they might then have asked that immediate possession of the property should be given to them. They did not, and they said nothing about the fixtures.

By sect. 23 the disclaimer operates as a surrender of the lease as from the date of the order of adjudication, *i.e.*, before the appointment of the trustee, or, in a liquidation, as from his appointment. If the Appellants are right in their contention, the result would be that, if the trustee had in any way dealt with the fixtures, he could not afterwards disclaim the lease, but must take to it, however onerous the covenants. The intention of the Act would thus be defeated. The trustee was lawfully in possession until he disclaimed; he was not, therefore, a mere trespasser.

[JAMES, L.J.:—He became so after the disclaimer.]

Penton v. *Robart* (2) shews that a tenant who is in possession after the expiration of his term is entitled to remove fixtures. And in *Elwes* v. *Maw* (3) the exception in favour of trade fixtures, from the general rule that everything annexed to the freehold is the property of the landlord, is fully recognised. The tenant has a right to remove the fixtures during his term, or, as *Parke*, B., said in *Macintosh* v. *Trotter* (4), "during what may, for this purpose, be considered as an excrescence on the term." In *Minshall* v. *Lloyd* (5) the landlord had taken possession before the seizure by the execution creditor, and the question arose between the sheriff and some assigns of the lessee, and the judgment of *Parke*, B., shews that the tenant's right extends beyond the mere term, for he says that "the steam engines were left affixed to the freehold

(1) 3 Ch. D. 459.
(2) 2 East, 88.
(3) 3 East, 38.
(4) 3 M. & W. 184.
(5) 2 M. & W. 450.

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C. A. 1877 *Ex parte* STEPHENS. *In re* LAVIES. Argument.

after the expiration of the term, and after the Plaintiffs had any right to consider themselves tenants." In *Weeton* v. *Woodcock* (1) the jury found that the tenant had not removed the fixtures within a reasonable time after the landlord's entry for a forfeiture. In *Pugh* v. *Arton* (2) the landlord had put a man into possession of the premises who had been forcibly ejected. The *London and Westminster Loan and Discount Company* v. *Drake* (3) shews that the tenant has an assignable interest in the fixtures, which he cannot defeat by surrendering the term, and *Williams*, J., who delivered the judgment of the Court, said (4): "It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant." The possession of a trustee in bankruptcy is something of this nature.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that we must accede to Mr. *Winslow's* argument. The law is clearly settled that the right of a tenant to fixtures is a qualified right. It is a right to have the fixtures if he removes them during his term, or during a certain time after its expiration, something which may be called an enlargement of the term, or, to use the words of Baron *Parke*, an excrescence on the term, during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord. In the present case the actual lessee himself did not remove the fixtures at all. By the joint operation of the trustee's disclaimer and the provisions of the *Bankruptcy Act*, the term is to be deemed for all purposes to have come to an end on the day of the adjudication, or, what is equivalent in the case of a liquidation by arrangement, the day of the appointment of the trustee. That is what the Act says. A removal of the fixtures months afterwards cannot be said to be a removal during the term or within a reasonable time after its expiration. The execution of the disclaimer by the trustee made him a mere stranger. He had the legal right to remain in possession of the premises for the purpose of exercising his judg-

(1) 7 M. & W. 14.
(2) Law Rep. 8 Eq. 626.
(3) 6 C. B. (N.S.) 798.
(4) Ibid. 810.

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ment whether he would or would not disclaim the lease. He was in possession for that purpose, and that only; that is the sole extent to which the statute gave him any right to retain possession. When he did disclaim the lease, the term was at once gone as from the date of his appointment. I know of no principle or authority for saying that a surrender can have any operation except upon the whole estate or interest derived under the lease. It is singular that none of the reported cases relate to an actual surrender, but I doubt whether the tenant could in any way whatever interfere with or limit the right of the landlord. It is not, however, necessary to determine this. I am of opinion that in the present case the disclaimer operated as a surrender of every interest of the tenant under the lease, and the order of the Registrar must be varied accordingly.

Judgment, James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am entirely of the same opinion. The Act permits the trustee to take time to consider whether he will or will not disclaim leasehold property of the bankrupt. But, if he does disclaim, the lease is to be deemed to have been surrendered on the day of the adjudication. As the Lord Justice has pointed out, if the lease had been put an end to then no estate would have remained in the trustee, and the Act says that the disclaimer is to operate notwithstanding that the trustee has endeavoured to sell, or has taken possession of the property, or has exercised any act of ownership in relation thereto.

THESIGER, L.J.:—

Thesiger, L.J.

I am of the same opinion. Apart from the action of the trustee himself the interest of the bankrupt in the lease would have vested in him with all the rights incident to it. Sect. 23 says that the trustee may disclaim a lease, and that the effect of his doing so is that the disclaimer relates back to the adjudication. It does not operate to divest any estate which may be in the trustee, but to place him in the position of never having had any estate at all. If the trustee does disclaim so as to escape the burdens imposed by the lease, it is impossible to hold that he can retain

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rights, which, whatever may be the exact principle on which they are founded, do certainly spring out of the term.

Solicitors for Executors: *Cowdell, Grundy, & Browne.*
Solicitors for Trustee: *Lewis & Lewis.*

C. A. 1877 M. R. *June* 30. C. A. *Nov.* 26.

In re PERCY & KELLY NICKEL, COBALT, AND CHROME IRON MINING COMPANY.

JENNER'S CASE.

Company—Winding-up—Director—Qualification—Condition Precedent.

The articles of a limited company, after naming the original directors, gave to the directors for the time being power to appoint new directors at any time before the first general meeting. It was then provided that no person should be qualified to be a director who was not a holder of shares in the company of the nominal value of £500; and that no person except the original directors, and such person as might be appointed by them, should be qualified to be a director who had not been a holder in his own right of such shares for at least six months.

J. was appointed a director by the original directors, and attended several meetings of the board, but never applied for or acquired any shares, and when the company was wound up his name was not on the register of shareholders:—

Held (affirming the decision of the Master of the Rolls), that the holding of the necessary number of shares was a condition precedent to the election of a director, and that *J.'s* election was therefore void; that his acting as director was no evidence of a contract to take the shares; and that his name could not be placed on the list of contributories.

Hamley's Case (1) approved.

Statement.

THIS was an application by the official liquidator of the *Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company, Limited,* which was in liquidation, to put the name of the Right Rev. *H. L. Jenner,* late Bishop of *Dunedin,* in *New Zealand,* on the list of contributories in respect of fifty shares of £10 each.

The company was registered on the 1st of October, 1875, with a nominal capital of £120,000 in shares of £10 each.

The articles provided that the directors should be not less than five nor more than eleven, and named six directors who were to hold office till the first general meeting of the company in 1880.

(1) 5 Ch. D. 705.

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C. A. 1877 JENNER'S CASE.

By Art. 99 it was provided "that the directors for the time being shall have power to appoint any other person or persons to be a director or directors at any time before the first general meeting to be held in the year 1880."

Art. 100 was as follows:—"No person shall be qualified to be a director who is not a holder of shares or stock in the company of the nominal value of £500, and no person except the original directors and such person as may be appointed by them under the last clause shall be qualified to be a director who has not been the holder in his own right of such shares or stock at least six months."

Statement.

Bishop *Jenner* was elected a director by the original directors at their first meeting in October, 1875. He afterwards attended six meetings of the board and took an active part in the proceedings, and his name appeared in the prospectus of the company as a director. But he never applied for any shares, nor were any allotted to him, and his name did not appear on the register of shareholders when the company was ordered to be wound up.

Under these circumstances the Chief Clerk refused to settle his name on the list of contributories, and the official liquidator accordingly applied to have his name placed on the list for fifty shares, being his qualification as a director.

The case was heard before the Master of the Rolls on the 30th of June, 1877.

Chitty, Q.C., and *H. M. R. Pope*, for the Appellant.

Kenyon Parker, for Bishop *Jenner*, relied on *Hamley's Case* (1).

Judgment, M.R.

JESSEL, M.R.:—

I think this case is really the same as *Hamley's Case*. It is simply a question of construction. If the qualification is required to be held by the director before the election, and he does not hold it, then, as I understand the question, the election is void. If the qualification may be acquired afterwards, and the director has a reasonable time for acquiring it, different considerations arise.

Now, the first point to be considered is, what is the meaning of

(1) 5 Ch. D. 705.

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C. A. 1877 JENNER'S CASE. Judgment, M.R.

the words in the 100th clause of the articles. [His Lordship read the clause.] Now, as to the six months mentioned in the latter part of the clause, the six months must run from some time or other, and the only possible meaning I can give to the words, which I did give to them in *Hamley's Case* (1), was the six months preceding the election. If that is the meaning of the latter part of the clause, the first part of the clause must refer to the time of the election, and we consequently have an express direction that the man shall be a holder of shares at the time of election, if he is to be nominated one of the directors.

If that be so, all that I said in *Hamley's Case* applies here; and it appears to me that what was said by the Court of Appeal in *Brown's Case* (2) also applies. The Lord Chancellor (Lord *Selborne*) says there that the mere acceptance of the office of a director by a person who is not the holder of the necessary number of shares does not import an implied contract that he will take the shares. And Lord Justice *Mellish* said this, "If the meaning of the articles of association was that a person must have the shares before he is qualified to be a director, the consequence would be that the election of Mr. *Brown* as a director would be wholly void." Then he goes on to say that the words of the clause before him admitted of the qualification being obtained within a reasonable time afterwards. It follows, therefore, from what I have said, that the election of Bishop *Jenner* was void, and that there is no implied contract on his part, his name not being on the register, to take the shares, so as to make him a contributory to this company.

C. A.

From this decision the official liquidator appealed. The appeal was heard on the 28th of November, 1877.

Argument.

Chitty, Q.C., and *H. M. R. Pope*, for the Appellant:—

This case is distinguishable from *Hamley's Case*, inasmuch as *Hamley*, although appointed by the directors, was not appointed by the original directors named in the articles, and therefore it might be considered that it was necessary that he should have held fifty shares for six months before his election. But no such

(1) 5 Ch. D. 705. (2) Law Rep. 9 Ch. 102, 109.

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JENNER'S CASE.

Argument.

restriction applied to the election of Bishop *Jenner*, who was appointed by the original directors at their first meeting.

We contend, in the first place, that upon the true construction of the articles the possession of a qualification was not a condition precedent to the election of Bishop *Jenner*, but that he had a reasonable time to acquire the qualification; and that there was an implied contract with the company that he would take the necessary number of shares. In the second place, we say that by acting and holding himself out as a director he is estopped from now saying that he had no qualification. The fact of his not being on the register as a shareholder makes no difference; for if a person ought to have been placed on the register the Court has the power to correct the register and insert his name. The authorities are not always consistent, but the result of them is distinctly in our favour: *Currie's Case* (1); *Stock's Case* (2); *Tothill's Case* (3); *Leeke's Case* (4); *Lord Claud Hamilton's Case* (5); *Brown's Case* (6); *Kincaid's Case* (7); *Harward's Case* (8); *Green's Case* (9); *Forbes' Case* (10); *Karuth's Case* (11); *Carling's Case* (12); *Stephenson's Case* (13); *Fowler's Case* (14); *Portal* v. *Emmens* (15); *Miller's Case* (16); *Barber's Case* (17); *De Ruvigne's Case* (18); *Lindley* on Partnership (19); *Buckley* on the Companies Acts (20).

Kenyon Parker, for Bishop *Jenner*, was not called on.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I think that it is impossible to say that the Master of the Rolls has come to an erroneous conclusion in this case. I regret that it is impossible to deal with the long string of cases which have been

(1) 3 D. J. & S. 367.
(2) 4 D. J. & S. 426.
(3) Law Rep. 1 Ch. 85.
(4) Ibid. 6 Ch. 469.
(5) Ibid. 8 Ch. 548.
(6) Ibid. 9 Ch. 102.
(7) Ibid. 11 Eq. 192.
(8) Ibid. 13 Eq. 30.
(9) Ibid. 18 Eq. 428.
(10) Ibid. 19 Eq. 353.
(11) Law Rep. 20 Eq. 506.
(12) 1 Ch. D. 115.
(13) 45 L. J. (Ch.) 488.
(14) Law Rep. 14 Eq. 316.
(15) 1 C. P. D. 664.
(16) 5 Ch. D. 70.
(17) Ibid. 963.
(18) Ibid. 306.
(19) 3rd Ed. p. 1419.
(20) 2nd Ed. p. 46.

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C. A. 1877 JENNER'S CASE. Judgment, C. A. James, L.J.

cited in such a way as to prevent their being cited again in future cases. They always have been cited, and I suppose always will be in these directors' cases. The Court, however, can only deal with the particular facts before it. It is sufficient to say that in my opinion it is governed by *Hamley's Case* (1) and *Barber's Case* (2). The only real question is whether the articles of association made the possession of a qualification a condition precedent to the election of a director. The 100th clause says, "No person shall be qualified to be director who is not the holder of shares or stock in the company of the nominal value of £500, and no person except the original directors and such person as may be appointed by them under the last clause shall be qualified to be a director who has not been the holder in his own right of such shares or stock at least six months." That must mean six months before the election; and that shews that the words in the former branch of the clause must mean that the person elected a director must hold the qualification at the time of his election. In one case no person can be elected who is not the holder of shares at the time; and in the other case no person who has not held them for six months before the time of election. The object of the distinction is obvious. The scheme of the clause is that only persons who have been shareholders for six months should be qualified to be directors; but the time is dispensed with in the case of the original directors, as to whom you could not get the period of six months, and in the case of those appointed by them, as to whom there would be the same difficulty. But the time only is dispensed with. It appears, therefore, to me that the qualification was a condition precedent, and that Bishop *Jenner's* election was void on the principle of *Barber's Case*. The Bishop's name was not on the register, and I cannot see any evidence of a contract on his part to take shares in the company. I cannot help thinking that in some of the cases the Court has been influenced by moral considerations, because strangers have been led to take shares by seeing the names of the persons elected as directors; and so the Court has been induced to go too far. But such cases ought to be decided on general principles, and the Court has to see whether there was really a contract by the company to allot, and by the

(1) 5 Ch. D. 705. (2) 5 Ch. D. 963.

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Bishop to take shares. I can see no evidence of any such contract. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, L.J.:—

Judgment, C. A. Baggallay, L.J.

I am of the same opinion. An exhaustive list of cases has been cited, but in my opinion only two have any bearing upon the present case. For, according to the true construction of the 100th clause of the articles of association, the possession of the requisite number of shares at the time of the election was necessary, and if they were not possessed at that time, the person elected did not become a director. That was so decided in *Barber's Case* (1), and also by the Master of the Rolls in *Hamley's Case* (2). And when once you have arrived at the conclusion that, on the true construction of the articles, the possession of a qualification was a condition precedent to the election, there could be only one result, namely, that Bishop *Jenner* was not a director.

THESIGER, L.J.:—

Thesiger, L.J.

I am also of the same opinion. The principle on which the Court must decide was laid down in *Barber's Case*, and the only question is whether the present case comes within it. I agree with Lord Justice *James* in his construction of the 100th clause in the articles, and am consequently of opinion that Bishop *Jenner* was not duly elected a director.

Solicitors: *Barnard & Co.; F. W. Snell.*

(1) 5 Ch. D. 963. (2) 5 Ch. D. 705.

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C. A.
1877
Nov. 29.

Ex parte WILLIAMS. *In re* THOMPSON.

Fraud on Bankruptcy Law—Proviso for Increase of Security in event of Mortgagor's Bankruptcy—Mortgage—Attornment Clause—Sham Rent—Distress—Bankruptcy of Mortgagor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 34—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36).

A mortgage of smelting works to secure the repayment of an advance of £55,000, contained, in addition to the ordinary clauses, a covenant by the mortgagee that, if the interest was punctually paid as it became due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagor should not have become bankrupt or have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of the mortgaged property, and should not have ceased to carry on his business thereon, then the mortgagee would not for a period of five years require payment of the principal. And the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged property at the yearly rent of £20,000, to be paid half-yearly on the days on which the interest on the mortgage debt was made payable. The deed was not registered under the *Bills of Sale Act*. It was admitted that the letting value of the property was not more than £3000 per annum. Four months after the execution of the mortgage the mortgagor filed a liquidation petition, and the mortgagee afterwards claimed the right to distrain the chattels upon the mortgaged property for a year's rent under the attornment clause:—

Held, that the arrangement was a mere device to give the mortgagee an additional security in the event of the mortgagor's bankruptcy, and was, therefore, in that event, void, as a fraud upon the bankrupt law, and that sect. 34 did not protect a distress levied for a mere sham rent.

The mortgagee was, therefore, restrained from levying a distress for the rent.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

By an indenture of mortgage dated the 15th of November, 1876, and made between *Astley Thompson* of the first part, the said *Astley Thompson* and *D. A. Onslow*, *C. H. Woods*, and *J. D. Thompson*, lead and silver smelters, trading as the *Burry Port Smelting Company*, the mortgagors, of the second part, and *J. W. Williams*, the mortgagee, of the third part, after (*inter alia*) a recital that the mortgagee had advanced to the mortgagors various sums amounting to £55,000, and had taken from the mortgagors their promissory notes for £30,000 and £25,000, dated the 1st of

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January, 1876, payable fourteen days after demand, with interest at the rate of 7 per cent. per annum half-yearly on the 1st of July and the 1st of January, the mortgagors covenanted with the mortgagee that they would pay the £55,000, with interest for the same in the meantime at the rate of 7 per cent. per annum, on the 1st of January, 1877, and also that, if the £55,000, or any part thereof, should remain unpaid after that day, they would, so long as the same sum or any part thereof should remain unpaid, pay interest for so much thereof as should for the time being remain unpaid at the rate of 7 per cent. per annum, by equal half-yearly payments, on the 1st of January and the 1st of July. And the mortgagors thereby granted to the mortgagee, his heirs and assigns, twenty-three acres of land situate at *Burry Port, Carmarthenshire*, together with the smelting works and all other works, erections, and buildings standing and being on the premises thereby granted, together with all buildings, erections, fixtures, and appurtenances, to hold the same unto and to the use of the mortgagee, his heirs and assigns, for ever, subject to an indenture of lease therein mentioned, and to the proviso for redemption thereinafter contained. And the said *Astley Thompson*, by the direction of the other mortgagors, did thereby demise, and the other mortgagors did, and each of them did, thereby demise and confirm unto the mortgagee, his executors, administrators, and assigns, certain coal mines and other leasehold property known as the *New Lodge Colliery and Brick Works*, and certain other leasehold property, to hold the same to the mortgagee, his executors, administrators, and assigns, for the residues of the respective terms for which the same were respectively held, except the last three days of the said terms respectively, subject as to part of the said premises to certain indentures of mortgage and further charge therein mentioned, and subject as to all the said premises to the proviso for redemption thereinafter contained. And the mortgagors also assigned unto the mortgagee all the engines, machinery, fixed and moveable plant, trade and other fixtures removeable by the tenant, gear, tools, implements, utensils, stock-in-trade, and chattels of what kind or nature soever, which then were or should be at any time during the continuance of the security erected, constructed, or brought, or be in, upon, or under

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Ex parte WILLIAMS. *In re* THOMPSON.

Statement.

the premises thereinbefore expressed to be demised, or any part thereof.

The proviso for redemption was on payment of the £55,000, with interest at the rate of 7 per cent per annum, on the 1st of January, 1877. There was a covenant by the mortgagors that if default should be made in payment of the principal or interest, or any part thereof respectively, contrary to the proviso for redemption, it should be lawful for the mortgagee to enter upon the mortgaged premises, and a covenant by the mortgagors that they would, when required by the mortgagee, execute to him a bill of sale of the chattels and premises thereinbefore assigned, and all other articles substituted for or added to the same premises, or any of them, and a power for the mortgagee to enter at any time for the purpose of carrying on and working the colliery and smelting works. And it was provided that after the 1st of January, 1877, it should be lawful for the mortgagee, at any time or times, without any further consent on the part of the mortgagors, to sell the mortgaged premises, or any part thereof, and repay himself what should remain due to him. There was a covenant by the mortgagee that if the mortgagors should, on every 1st of July and 1st of January, until the 1st of January, 1881, or within thirty days next after each of the said days respectively, pay to the mortgagee interest for the £55,000 at the rate aforesaid up to the same half-yearly days of payment respectively, and should observe all the covenants therein contained on their part (other than the covenant for payment of the principal and the interest thereon), and should not any of them have become bankrupt, or have taken proceedings for liquidation by arrangement or composition with their creditors, or otherwise with the view to obtaining the benefit of any statutory provision for the time being in force for the relief of or dealing with the affairs of insolvent debtors, or entered into any composition or arrangement with their or his creditors, or suspended payment, and should not have parted with the possession of the mortgaged premises, and should not, whether voluntarily or involuntarily, have ceased to carry on their present business thereon, then and in such case the mortgagee would not before the 1st of July, 1881, or before the death of the survivor of the mortgagors, which should first arrive, require payment of the £55,000 or any part

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thereof, or discount, deal with, or part with the two promissory notes or either of them. Provided also that the mortgagors should not before the 1st of January, 1881, compel the mortgagee to receive the £55,000 or any part thereof. And it was further witnessed that the mortgagors did thereby attorn and become tenants from year to year to the mortgagee for and in respect of the mortgaged premises, at the yearly rent of £20,000, to be paid by equal half-yearly payments on the 1st of January and the 1st of July in every year, the first half-yearly payment to be made on the 1st of January, 1877. Provided that, if the mortgagors should make default in payment of the £55,000, or the interest thereon or any part thereof respectively contrary to the proviso for redemption, then, or at any time thereafter, it should be lawful for the mortgagee, upon giving fourteen days' previous notice upon the premises of his intention so to do, to enter upon the premises whereof the mortgagors had attorned tenants, and to determine and put an end to the tenancy created by the attornment. The deed was not registered under the *Bills of Sale Act*, and no bill of sale of the chattels was executed in pursuance of the covenant. It was admitted that the letting value of the mortgaged property was not more than £3000 per annum.

On the 30th of November, 1876, a deed was executed by which the mortgagee released the *New Lodge Colliery and Brick Works* from the mortgage, without prejudice to his rights as against the smelting works and the other property comprised in the mortgage deed of the 15th of November, 1876. No fresh attornment by the mortgagors took place in respect of the property which remained subject to the mortgage. The half-yearly interest which became due on the 1st of January, 1877, was paid. On the 23rd of March, 1877, the mortgagors filed a liquidation petition, and on the 27th of April a trustee of their property was appointed. The mortgagee claimed the right to distrain upon the mortgaged premises for the two half-yearly payments of £10,000 each which became due on the 1st of January and the 1st of July, 1877, in respect of the tenancy created by the attornment, and levied a distress accordingly.

The Registrar, on the application of the trustee, granted an injunction restraining the mortgagee from proceeding with his distress. The mortgagee appealed.

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C. A. 1877 *Ex parte* WILLIAMS. *In re* THOMPSON. Argument.

De Gex, Q.C., and *Russell Roberts*, for the Appellant:—

This deed is not open to the objection which was the ground of the decision in *Ex parte Mackay* (1). This is an ordinary mortgage with a proviso that certain relaxations shall be made in favour of the mortgagors if they continue solvent. It is like the common clause for reduction of the interest payable on a mortgage if it is punctually paid and the mortgagor remains solvent. There is nothing objectionable in provisions of this kind. The distinction between *Ex parte Mackay* and the present case is analogous to the well-known distinction between a penalty and an indulgence—a distinction which may turn entirely upon the exact frame of the clause: *Thompson* v. *Hudson* (2). The relaxation is carved out of the estate of the mortgagee, not out of the estate of the mortgagors. That is the test of its validity. The attornment clause is a very common one in mortgages, and it creates the relation of landlord and tenant between the mortgagee and the mortgagor: *Jolly* v. *Arbuthnot* (3); *Morton* v. *Woods* (4). Consequently, by virtue of sect. 34 of the *Bankruptcy Act*, 1869, the mortgagee is entitled, notwithstanding the bankruptcy, to distrain for a year's rent. The fact that the operation of the attornment clause is accelerated by the happening of the bankruptcy cannot affect its validity. It cannot be said that the *Bills of Sale Act* is evaded; the question is whether its provisions are in any way violated: *Smale* v. *Burr* (5); *Ramsden* v. *Lupton* (6); *Ex parte Barclay* (7). The right to distrain is a legal incident to the tenancy created; there is no right given to any specific chattels, and therefore the *Bills of Sale Act* has no application: *Morton* v. *Woods* (8).

Winslow, Q.C., and *W. P. Beale*, for the trustee, were not heard.

Judgment, James, L.J.

JAMES, L.J.:—

It appears to me impossible to distinguish this case in principle from *Ex parte Mackay*. There Lord Justice *Mellish* said: "The case comes directly within what Lord *Eldon* says in *Higginbotham*

(1) Law Rep. 8 Ch. 643.
(2) Ibid. 4 H. L. 1.
(3) 4 De G. & J. 224.
(4) Law Rep. 4 Q. B. 293.
(5) Law Rep. 8 C. P. 64.
(6) Ibid. 9 Q. B. 17.
(7) Ibid. 9 Ch. 576.
(8) Ibid. 4 Q. B. 293, 307.

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v. *Holme* (1). There his Lordship says, 'This settlement looks forward to a change of intention, to the purpose of becoming a trader; and looks forward expressly to the possible consequences of that purpose; and so looking forward to such a change of purpose, and to such consequences, it is a limitation by the effect of which the estate would go to the creditors; that change being adopted with the express object of taking the case out of reach of the bankrupt laws; and as to the consideration from the covenant of the father, which, though it may perhaps prove worth little or nothing, is to be regarded as a consideration with reference to all the provisions of the settlement, though undoubtedly an annuity might have been provided by the settlement for the wife in all events, yet it is not competent to a party, giving a consideration for a contract that is a direct fraud upon the bankrupt laws, to have the benefit of it.' That is to say, as I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws." In my opinion, looking at the whole scope and object of this deed, at the whole intention of the parties, and taking a common-sense view of the thing, it is impossible not to see that it was intended to make a different distribution of the property of the mortgagors according as they should or should not become bankrupt. It was intended that, if they should become bankrupt, certain chattels which were not included in the deed should become an additional security to the mortgagee for his debt. It appears to me that the attornment clause was a mere sham, a mere contrivance and device to give the mortgagee an additional benefit in the event of the mortgagors' bankruptcy. That is an attempt to defeat the operation of the bankruptcy laws which cannot succeed. The appeal must, therefore, be dismissed.

Judgment, James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am entirely of the same opinion. I agree that we ought to look only at the deed, and it appears to me that the attornment clause is a mere device to give the mortgagee an additional advantage over the other creditors of the mortgagors in the event of their bankruptcy. That is a fraud upon the bankrupt law.

(1) 19 Ves. 88, 92.

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C. A. 1877 *Ex parte* WILLIAMS. *In re* THOMPSON. Judgment, Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. Sect. 34 preserves to a landlord, in the event of his tenant's bankruptcy, the right of distraining for a year's rent of the demised premises. I agree that if there is anything in that section repugnant to the general bankrupt law its express terms must countervail that general law. We have nothing to do with the spirit of the law. But it seems to me that sect. 34 is in no way inconsistent with the general law of bankruptcy, that according to its true meaning what the Legislature intended to protect was a real *bonâ fide* rent, and that the section has no application to a case like the present, where the rent is a mere device by which the mortgagee is, in the event of the mortgagors' bankruptcy, to obtain a security upon chattels which have not been assigned to him by any bill of sale, and which, but for this device, would be distributed among the other creditors of the mortgagors. What are the facts? The mortgagee has stipulated that if the mortgagors pay the interest on the debt punctually, and have not become bankrupt, and have not done certain other specified things, they shall retain possession of the mortgaged property for five years. This is a perfectly separate stipulation, and though it might have operated to determine the mortgagors' possession upon the happening of other events, it was evidently intended to have that operation only in the event of their bankruptcy. Then there is the attornment clause, which is introduced for the purpose of obtaining the benefit of sect. 34 of the Act. No one has suggested that £20,000 was a fair rent for the property; it was clearly intended only as a sham rent. The whole scheme is therefore void as against the trustee in the liquidation.

JAMES, L.J.:—

The point has not been argued, but I desire to say that I am by no means satisfied that the tenancy at will created by the attornment clause was not entirely determined by the release of a part of the property by the deed of the 30th of November, 1876.

Solicitors for Mortgagee: *Tucker & Lake.*
Solicitors for Trustee: *Clarke, Rawlins, & Clarke.*

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Ex parte EYSTON. *In re* THROCKMORTON.

C. A. 1877 Nov. 29.

Annuity—Forfeiture on Bankruptcy—Cesser on doing or permitting any Act whereby the Annuity would be aliened.

A testator gave an annuity to his son, with a proviso that if he should "at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner whatsoever," the annuity should cease. The son neglected to comply with a debtor's summons, and was thereupon adjudicated a bankrupt:—

Held, that the annuity ceased.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Sir *R. G. Throckmorton*, by his will, dated the 1st of March, 1855, devised all his real estates to the use of trustees in fee, subject to the charges, powers, and provisions thereinafter contained, in trust for his first and other sons successively in tail, with remainder in trust for all his daughters as tenants in common in tail, with cross-remainders between and among them, with remainder in trust for his own right heirs: Provided always, and he declared that if at his death any son of his should become or be entitled to the real estate thereinbefore devised for an estate tail in possession under the trusts thereinbefore contained, then and in such case he gave and bequeathed and thereby charged such real estate with the payment of an annuity of £150 to each and every of his younger sons and daughters then living, payable thenceforth half-yearly during the respective lives of each and every such younger son, and during the respective lives of each and every of such daughters, if they should respectively so long remain unmarried, or until such younger sons or daughters respectively should have become entitled to the said real estate, or any share therein, for an estate tail in possession under the trusts thereinbefore contained: Provided always, and the testator declared that "if any son or daughter of mine vestedly or presumptively entitled to any such annuity shall at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner

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Ex parte EYSTON. *In re* THROCKMORTON.

whatsoever, the said annuity to which such son or daughter of mine shall be so entitled shall thereupon absolutely cease, determine, and be void, and shall sink into the real estate hereby charged therewith for the benefit of the person or persons for the time being entitled to such real estate under the trusts hereinbefore contained."

Statement.

The testator died in 1862. His son, Sir *Nicholas Throckmorton* thereupon became tenant in tail of the devised estates, and an annuity of £150 became payable to *Richard Throckmorton*, a younger son. In 1876 *Richard* was adjudicated a bankrupt, the act of bankruptcy being the failure to comply with a debtor's summons which had been served upon him by the petitioning creditor. On the application of the trustee in the bankruptcy the Registrar ordered that the annuity of £150 should, as from the commencement of the bankruptcy, be paid by the trustees of the will to the trustee in the bankruptcy. The trustees of the will appealed.

Argument.

H. Matthews, Q.C., and *Romer*, for the Appellants:—

The question is whether the words "do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner whatsoever," are large enough to include an alienation by operation of law. We say that they are.

In *Lear* v. *Leggatt* (1) a gift by will of a life interest provided that, in case the tenant for life should charge or attempt to charge, affect, or incumber his life interest, such mortgage, sale, or other disposition or incumbrance should operate as a complete forfeiture, and it was held that the forfeiture did not take effect on bankruptcy. But there the words pointed only to voluntary alienation by the tenant for life. There is another class of cases, such as *Croft* v. *Lumley* (2), where it was held that a warrant of attorney to enter up judgment was not a breach of a covenant not to charge or incumber a lease; *Doe* v. *Carter* (3), where it was held that a covenant not to assign, transfer, make over, barter, exchange, or otherwise part with a lease, was not broken by the lessee giving a warrant of attorney to confess judgment under which the lease

(1) 1 Russ. & My. 690. (2) 5 H. L. C. 672.
(3) 8 T. R. 57.

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was taken in execution and sold; and *Doe* v. *Hawke* (1), which is to a similar effect. But in *Doe* v. *Carter* (2) it was held that if the warrant of attorney was given for the express purpose of enabling the creditor to seize the lease, there would be a forfeiture. Another class of cases is where the donee of property originated a chain of legal proceedings which ended in an alienation of the property—where he, so to speak, set the ball rolling—such as *Shee* v. *Hale* (3), *Rochford* v. *Hackman* (4), *Martin* v. *Margham* (5), *Brandon* v. *Aston* (6), and *Churchill* v. *Marks* (7), which were cases of filing a petition under the *Insolvent Debtors Act*; *In re Amherst's Trusts* (8), which was the case of filing a liquidation petition under the *Bankruptcy Act*, 1869; and *Davis* v. *Eyton* (9), where a lease was to be forfeited in case the lessee contracted a debt on which judgment was obtained followed by execution. These cases all point to a personal act done by the donee of the estate. There are other cases where there was not a personal act by the donee, such as *Dommett* v. *Bedford* (10), where an annuity was to cease if the donee should alienate it, and it was held that upon an assignment of the annuity by the Commissioners after his bankruptcy the annuity ceased; and *Cooper* v. *Wyatt* (11), where it was held that bankruptcy worked a forfeiture of an annuity which was to cease if the donee should sell, dispose of, or incumber it.

The cases most like the present are those in which a forfeiture was to take place on doing, or suffering, some act, deed, or thing, such as *Hill* v. *Cowdery* (12), where an assignment of chattels by way of mortgage provided that the assignor should remain in possession until default in payment after demand, and contained a covenant by the assignor not to execute or suffer any act, deed, matter, or thing, by means of which the premises should be assigned, charged, or prejudicially affected, or whereby the mortgagee might be hindered from receiving, recovering, or taking possession of the same, and it was held that filing a declaration of

(1) 2 East, 481.
(2) 8 T. R. 300.
(3) 13 Ves. 404.
(4) 9 Hare, 475
(5) 14 Sim. 230.
(6) 2 Y. & C. Ch. 24.
(7) 1 Coll. 441.
(8) Law Rep. 13 Eq. 464.
(9) 7 Bing. 154.
(10) 6 T. R. 684.
(11) 5 Madd. 482.
(12) 1 H. & N. 360.

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C. A. 1877 — *Ex parte* EYSTON. *In re* THROCKMORTON. — Argument.

insolvency under sect. 70 of the *Bankrupt Law Consolidation Act*, 1849, was a breach of the covenant: *Roffey* v. *Bent* (1), where, the words being until he "shall do or suffer any act" whereby income should become payable to another person, it was held that the obtaining of a charging order by a judgment creditor worked a forfeiture; and *Montefiore* v. *Behrens* (2), which is a somewhat similar case. There is really no distinction between "to suffer" and "to permit"; "permit" has a passive as well as an active sense. Here the act of bankruptcy was the "neglecting" to comply with a debtor's summons: *Bankruptcy Act*, 1869, s. 6; the bankrupt allowed that to happen which he knew could only end in bankruptcy. "Permit" must refer to some legal proceeding; a man cannot in any other way permit another person to incumber his estate. "Permit" is used in contradistinction to "do"; it must therefore be used in its passive sense.

De Gex, Q.C., and *Pollard*, for the trustee in the bankruptcy:—

The cases relating to proceedings under the *Insolvent Debtors Act* do not apply; there was a great distinction between bankruptcy and insolvency; the one was compulsory, the other was voluntary. If the testator meant that there should be a forfeiture on bankruptcy he could have said so. Probably he intended that his son should be honest and pay his creditors. *Pym* v. *Lockyer* (3), *Churchill* v. *Marks* (4), and *In re Amherst's Trusts* (5), were cases of voluntary acts. In *Wilkinson* v. *Wilkinson* (6) it was held that bankruptcy did not cause a forfeiture. *Lear* v. *Leggatt* (7), *Croft* v. *Lumley* (8), and *Hill* v. *Cowdery* (9) are in our favour; *Cooper* v. *Wyatt* (10) has been explained in more recent cases. In *Graham* v. *Lee* (11) it was held that filing a voluntary declaration of insolvency, under which a fiat immediately issued, did not create a forfeiture. A man cannot be said to "permit" that which he cannot help: *Load* v. *Green* (12); *Ex parte Ford* (13); *Bosley* v. *Davies* (14);

(1) Law Rep. 3 Eq. 759.
(2) Ibid. 1 Eq. 171.
(3) 12 Sim. 394.
(4) 1 Coll. 441.
(5) Law Rep. 13 Eq. 464.
(6) G. Coop. 259.
(7) 1 Russ. & My. 690.
(8) 6 H. L. C. 672.
(9) 1 H. & N. 360.
(10) 5 Madd. 482.
(11) 23 Beav. 388.
(12) 15 M. & W. 216.
(13) 1 Ch. D. 521, 528.
(14) 1 Q. B. D. 84.

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Redgate v. *Haynes* (1). "Permit" might perhaps include not setting up a good defence to an action if the Defendant had a good defence. "Permit" must be something voluntary. The neglect to comply with the debtor's summons is not the *causa causans* of the bankruptcy; the act of bankruptcy does not necessarily work a change of ownership of the debtor's property, and, moreover, the act of bankruptcy committed by failure to comply with a debtor's summons is available for adjudication to the summoning creditor only: *Bankruptcy Act*, 1869, s. 6.

Argument.

Tyser v. *Jones* (2) shews the difference between voluntary and compulsory alienation.

JAMES, L.J.:—

Judgment, James, L.J.

I am of opinion that the order of the learned Registrar cannot be sustained, but I do not feel any surprise whatever at his having arrived at the conclusion at which he did arrive, looking at the number of authorities and the nice distinctions apparently to be drawn between them. There is one authority, the case of *Roffey* v. *Bent* (3), before the late Lord *Romilly*, which is very nearly directly in point, in which the word "suffer" was used in contradistinction to the word "do." I am of opinion that there was good sense and good law in that decision, and I think it would be almost an absurd distinction to suppose that there is any difference between the words "suffer" and "permit." According to the dictionaries, "suffer" means "permit" and "permit" means "suffer." It would really be straining the meaning of the words too much to say that there is any substantial difference between "suffer" and "permit." Therefore we could not, I think, affirm the decision of the learned Registrar in this case without, in fact, overruling that decision of Lord *Romilly*.

But, independently of that, dealing with the thing as a matter of common sense, we must endeavour to ascertain what is the fair meaning of the words used by the testator. He has used very general words. He may have been advised to do so, and not to have a long string of words, followed by general words, the plain meaning of which is very often overridden by the preceding

(1) 1 Q. B. D. 89. (2) 3 L. J. (Ch.) 241.
(3) Law Rep. 3 Eq. 759.

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C. A. 1877. *Ex parte* EYSTON. *In re* THROCKMORTON.

particular words. Then he has used these words: "If he shall do or permit any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged, or incumbered." What is there in the ordinary fair meaning of the words, having regard to the thing he was dealing with—having regard to the cesser of the interest he had given to his son, what is there to which you could apply the word "permit" except legal proceedings, which a man does permit to such an extent as to cause an alienation of his property? I think that is the plain meaning of the words. If a man has been guilty of default he is a party to that default. If he has already squandered his money in contracting debts beyond his means—if he is thereby guilty of the default of not paying his debts, why then he is permitting to occur something whereby or by means whereof the property intended for him is aliened or gets into the possession of a stranger who is not intended to be benefited by the estate.

I think that is really the fair meaning of the words of the testator, and therefore this appeal must be allowed.

Judgment, James, L.J.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion.

The word "permit" is clearly put by the testator in contradistinction to something done. I am unable to give any meaning to the word "permit" as so used in contradistinction to the word "do" if it is not applicable to such a case as we are now considering. The son is called upon to pay a debt, he stands by and does not pay it. The immediate consequence of his not paying it is that he commits an act of bankruptcy, by which act of bankruptcy, but for the provisions of the will, the annuity would be aliened. It seems to me impossible to say that he has not done or permitted an act or thing by means whereof the annuity is aliened.

Thesiger, L.J. THESIGER, L.J.:—

I am of the same opinion.

The meaning of the clause is no doubt open to some argument, but I think that we should be limiting the true force of the expressions used if we were to hold that the contention on the part

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of the Respondent is good. I agree as to what has been said as to the collocation of the words "do" and "permit."

This observation also seems to me to arise, that, inasmuch as it is admitted that the word "permit" may be used in a passive as well as in an active sense, I cannot see any reason why in this particular will you should limit the use of the word to the one sense or the other.

Solicitors for Trustees of Will: *Ward, Mills, & Co.*

Solicitors for Trustee in Bankruptcy: *Tidy, Herbert, & Tidy.*

MORRELL *v.* COWAN.

[1876 M. 292.]

Guarantee—Construction—Consideration—Past Debts.

The wife of a retail dealer who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you having at my request agreed to supply and furnish goods to *C.*" (her husband), "I do hereby guarantee to you the sum of £500. This guarantee is to continue in force for the period of six years and no longer":—

Held (reversing the decision of *Fry*, J.), that the guarantee was limited to goods actually supplied to the husband after it was given.

Statement.

THIS was an appeal from a decision of Mr. Justice *Fry* (1).

The action was brought to enforce against the separate estate of the Defendant *Sarah Ann Cowan* a guarantee given by her to the Plaintiff, *George Morrell*, in order to obtain credit for her husband, the Defendant *M. M. Cowan*.

The Plaintiff was a leather factor at *Leeds;* the Defendant *M. M. Cowan* was a boot and shoe manufacturer at the same place, who from time to time obtained goods from the Plaintiff on credit. On the 24th of December, 1875, an acceptance of *Cowan* for £176 6*s.* 4*d.*, which he had given to the Plaintiff in payment for goods supplied, was dishonoured. The Plaintiff then refused to supply *Cowan* with any more goods on credit unless he would give security. *Cowan's* wife was entitled to considerable separate estate under the will of her former husband. She was not restrained

(1) 6 Ch. D. 166.

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C. A. 1877 MORRELL v. COWAN.

Statement.

from anticipation, and no settlement of the property had been made upon her marriage with *Cowan*. On the 22nd of January, 1876, she gave the following guarantee to the Plaintiff:—

"To Mr. *George Morrell*.

"*Leeds*, 22nd January, 1876.

"In consideration of you the said *George Morrell* having at my request agreed to supply and furnish goods to *M. M. Cowan*, I hereby guarantee to you the said *G. Morrell* the sum of £500. This guarantee is to continue in force for the period of six years and no longer. As witness my hand this 22nd January, 1876.

"(Signed) *Sarah Ann Cowan*."

After the 22nd of January the Plaintiff supplied *Cowan* with three parcels of goods to the value of £38 10*s*. 8*d*., but *Cowan* had paid for all of the goods except the third parcel, the value of which was £5 16*s*. at the time of the commencement of the action. On the 22nd of July, 1876, the Plaintiff recovered judgment in an action against *Cowan* for £385 4*s*. 4*d*. in respect of goods supplied before and after the date of the guarantee; and soon afterwards *Cowan* filed a liquidation petition. The Plaintiff then commenced the present action against Mrs. *Cowan* on her guarantee. The facts are given in more detail in the previous report.

Mr. Justice *Fry* held that the guarantee was not limited to the price of goods supplied after it was given, but that it extended to any sums, to the amount of £500, which should be due to the Plaintiff from *Cowan* within six years, although arising out of previous transactions. From this decision Mrs. *Cowan* and her husband appealed.

Argument.

North, Q.C., and *Freeling*, for the Appellants:—

The only reasonable construction of the guarantee is that it extends only to the price of goods supplied after its date, the sum of £500 being the measure of liability. Neither the agreement to supply goods nor the previous liability of *Cowan* was the consideration for the guarantee, but the actual supply of the goods when it took place; and it would be absurd to say that for the supply of goods worth only £1 Mrs. *Cowan* intended to make herself liable for £500: *Wood* v. *Priestner* (1); *Westhead* v. *Sproson* (2); *Steel*

(1) Law Rep. 1 Ex. 66, 282. (2) 6 H. & N. 728.

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v. *Hoe* (1). We also contend that the document is void under the *Statute of Frauds*, because the agreement is not to be performed within a year, and as the consideration is not duly set forth, there is no sufficient agreement in writing within the statute.

Argument.

Cookson, Q.C., and *J. Chester* for the Plaintiff:—

The agreement to supply goods was a sufficient consideration for the guarantee. The mere words "I guarantee you £500" are nonsense without explanation. We must, therefore, look at the surrounding circumstances: *Heffield* v. *Meadows* (2); *Laurie* v. *Scholefield* (3); *Mason* v. *Pritchard* (4). It was of very great importance to *Cowan* and his wife that the Plaintiff should continue to supply goods; his business entirely depended upon it, and it was not unreasonable that Mrs. *Cowan* should risk a large sum for that purpose. At all events, the subsequent supply of goods was a good consideration for the guarantee, and there being such, the amount of the consideration is unimportant: *Burgess* v. *Eve* (5); *Offord* v. *Davies* (6); *Johnston* v. *Nicholls* (7); *Boyd* v. *Moyle* (8). With respect to the objection based upon the *Statute of Frauds*, that statute has no application, as the agreement does not necessarily extend beyond a year: *Donellan* v. *Read* (9); *Chitty* on Contracts (10).

Judgment, James, L.J.

JAMES, L.J.:—

I am compelled to come to a different conclusion from the learned Judge in the Court below. The question turns upon the construction of a very few words in a short document: the document is as follows:—[His Lordship read the guarantee given by Mrs. *Cowan*.] Now, the first thing that is observable in reading this document is that the actual words of guarantee, "I do hereby guarantee to you, *George Morrell*, the sum of £500," are without meaning. Standing alone they would have no legal operation. By whom was the £500 to be paid? by her husband or by what

(1) 14 Q. B. 431.
(2) Law Rep. 4 C. P. 595.
(3) Ibid. 622.
(4) 12 East, 227.
(5) Law Rep. 13 Eq. 450.
(6) 12 C. B. (N.S.) 748.
(7) 1 C. B. 251.
(8) 2 C. B. 644.
(9) 3 B. & Ad. 899.
(10) Page 71.

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Judgment, James, L.J.

other person? Therefore, in order to ascertain the meaning of this guarantee, we must refer to the previous words of the document. You cannot attach any meaning to the guarantee without introducing the words which express the consideration. These words are as follows:—"In consideration of you, *George Morrell*, having at my request agreed to supply and furnish goods to *M. M. Cowan*, I do hereby guarantee," &c. What does that mean? Surely it means, "If you will supply goods to my husband, I will guarantee the payment for the goods which you supply to the amount of £500." It is impossible, in my opinion, to read it otherwise. It is, of course, open to a married woman to make such an agreement as that contended for by the Appellants, namely, that in consideration of the supply of a small amount of goods to her husband, she would guarantee the payment of his debts then due; but such an agreement must be expressed in clear and unambiguous terms. It is not sufficient to use such words as these: "I agree to guarantee you the sum of £500."

Mr. Justice *Fry* considered that he was bound to look at the surrounding circumstances, and he specially referred to an acceptance for £176 which had been dishonoured. But I do not agree that that acceptance was such a surrounding circumstance as the Court can look at. The only circumstances which really bear upon the guarantee are the applications by *Cowan* to *Morrell* to supply goods, and his refusal to supply any more goods unless he could give security. I rest my decision on the reasonable construction of the guarantee, and give no opinion on the question raised respecting the *Statute of Frauds*, although I think it is a question that deserved attention.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. We are called upon to construe the agreement for a guarantee dated the 22nd of January, 1876. We can have no regard to any parol agreement between the parties, but the Court is entitled to look at the position of the parties at the time. What, then, was that position? *Morrell* was a leather factor, and *Cowan* was a shoe manufacturer, and was indebted to *Morrell* for goods supplied in the course of his trade. Mrs. *Cowan* was possessed of separate estate, and when *Cowan* applied for a further supply of goods *Morrell* refused to supply them, but was

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willing to do so on receiving a guarantee from Mrs. *Cowan*. What, then, is the construction of this guarantee? I agree that the guarantee itself is expressed in words which have no meaning, and we must get at the interpretation of those words from the other parts of the agreement. Now, when we look at the document we find that the expressed consideration is really no consideration at all: the agreement to supply goods at Mrs. *Cowan's* request was no consideration, for there was no obligation on the part of the Plaintiff to supply any goods. But when the request was complied with, and the goods were actually supplied, then a consideration arose. No question could arise between the parties till the goods were actually supplied. When, therefore, we look at the whole instrument, we see that it is a guarantee for goods supplied to *Cowan*, and this is borne out by the clause that the guarantee is to continue in force for six years. Mrs. *Cowan* says in effect, "If you will continue to supply goods for six years, I will so long continue this guarantee." But it is suggested that the agreement had another meaning, namely, that although Mrs. *Cowan* was at that time under no liability to pay any of her husband's debts, yet she undertook this liability, that, in consideration of a supply of goods, which might be very small indeed, she would guarantee the payment of all her husband's debts for six years. I cannot see how this construction can be put upon the instrument. I do not rest my opinion upon the hardship to Mrs. *Cowan*, but it appears to me that it is so improbable that this was the intention of the parties, that I should hesitate long before I put such a construction upon the instrument. And, on the other hand, the instrument will bear the other construction, which is perfectly reasonable. I say nothing as to the other point referred to by the Lord Justice, as I rest my judgment on the construction of the agreement.

Judgment, Baggallay, L.J.

THESIGER, L.J.:—

Thesiger, L.J.

I am of the same opinion. I agree that in determining the construction of this instrument the Court is entitled to look at the surrounding circumstances; that is to say, it is entitled to consider, first, who the parties were; secondly, in what position they were; and, thirdly, what the subject-matter of the agree-

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C. A. 1877 MORRELL v. COWAN. Judgment, Thesiger, L.J.

ment was. Now we find that *Morrell* was a leather factor, and that *Cowan* was a shoe manufacturer, and was indebted to him for certain goods supplied to him in the way of trade. *Cowan* was anxious to get a further supply, which *Morrell* was willing to furnish if he had a guarantee from Mrs. *Cowan*, who had separate estate. To these circumstances we may look, but we cannot go further. It is not open to the parties to shew that there was a parol bargain that Mrs. *Cowan* should guarantee her husband's past debts, or that the guarantee should be confined to future debts; that question must rest upon the written instrument alone.

Coming, then, under these circumstances, to the construction of the document, we find, in the first place, that the agreement was for a future supply of goods, and we naturally come to the conclusion that the wife intended to guarantee the payment for such goods. Starting from that, we have, first, the consideration stated, "You having at my request agreed to supply and furnish goods." Obviously, though the agreement was past, the supply of goods was future. Then it proceeds, "I do hereby guarantee to you the sum of £500." We have to ascertain what this means. It is suggested by the Respondent that it makes Mrs. *Cowan* liable to pay £500 for the previously contracted debts of her husband in consideration of a supply of goods which might only amount to a few shillings. This is clearly open to the observation that nothing is said about past debts in the document; and on the other hand, the ordinary and natural construction of the words is that Mrs. *Cowan* guarantees payment of the goods to be supplied to a maximum of £500. I am, therefore, of opinion that the judgment of Mr. Justice *Fry* must be reversed.

JAMES, L.J.:—

The only debt remaining due on account of the goods supplied appears to be £5 16*s.*, the price of the last parcel of goods supplied; and the Defendants undertaking to pay that amount to the Plaintiff, the bill will be dismissed with costs.

Solicitors for Plaintiff: *Speechley, Mumford, & Co.*, agents for *Rooke & Midgley, Leeds.*

Solicitors for Defendants: *Torr & Co.*, agents for *B. C. Pullan, Leeds.*

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Ex parte HALLING. *In re* HAYDON.

C. A. 1877 Dec. 6.

Trader — Execution for Sum exceeding £50—Adverse Claim—Interpleader Summons—Order for Sale and Payment to Execution Creditor—Subsequent Bankruptcy of Debtor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.

The goods of a trader were seized on the 19th of August under an execution in respect of a judgment debt of £115. The holder of a bill of sale for £37 10*s.* claimed the goods, and the sheriff issued an interpleader summons. On the 28th of August a Judge ordered that the sheriff should sell the goods, and out of the proceeds pay £37 10*s.* into Court, and pay the balance to the execution creditor, and that an issue should then be tried between him and the bill of sale holder as to the property in the goods at the time of the seizure. On the 7th of September, before the sheriff had sold, the trader filed a liquidation petition:—

Held, that the trustee in the liquidation was entitled to the goods, subject to the claim of the bill of sale holder.

Parsons v. *Lloyd* (1) questioned.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

On the 16th of August, 1877, judgment was signed for £75 damages and £40 12*s.* 6*d.* costs in an action brought in the Common Pleas Division by *George Halling* against *Thomas Haydon*, a trader, and on the same day a writ of *fi. fa.* was issued thereon and lodged with the sheriff, who on the 19th of August seized goods of *Haydon*. The goods were afterwards claimed by one *Edward Mincher* under a bill of sale for £37 10*s.* executed by *Haydon*. The sheriff then issued an interpleader summons, which came on for hearing on the 28th of August before Mr. Justice *Lopes*, who made an order that the sheriff should sell the goods, and that out of the proceeds of the sale (after deducting expenses) he should pay the sum of £37 10*s.* into Court, and the balance (if any), after deducting fees and expenses, to the execution creditor. And it was further ordered that, upon payment of the £37 10*s.* into Court, the parties should proceed to the trial of an issue to determine whether at the time of the seizure the goods were the property of the claimant as against the execution creditor. The

(1) Law Rep. 1 Ex. 307, n.

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C. A. 1877

Ex parte HALLING. *In re* HAYDON.

Statement.

sheriff advertised the sale of the goods for the 10th of September, but on the 7th of September *Haydon* filed a liquidation petition, and an interim injunction was granted to restrain the sheriff from selling. The injunction was continued from time to time, and ultimately, on the 17th of October, the Registrar made an order declaring that the goods seized were the property of the trustee in the liquidation as against the execution creditor, but subject to the claim of *Mincher* for £37 10*s*.

The execution creditor appealed.

Argument.

E. C. Willis, for the Appellant:—

Sect. 87 of the *Bankruptcy Act*, 1869, does not apply, because the title of the Appellant to the goods is not derived under the execution, but under the order of Mr. Justice *Lopes*, which declared that he was entitled to the proceeds of sale, subject only to the claim of *Mincher*. *Parsons* v. *Lloyd* (1) is an authority for this proposition, and its authority is recognised in *O'Brien* v. *Brodie* (2). After the order was made the sheriff would have been liable to the execution creditor if he had not paid over the proceeds of sale (*ultrà* the £37 10*s*.) to him at once. A debtor might get up a fictitious interpleader summons, in order to delay the sale and defeat his execution creditor.

Finlay Knight, for the trustee, was not heard.

Judgment, James, L.J.

JAMES, L.J.:—

It really seems to me that this case comes within the plain words of the Act. The words of sect. 87 are very clear. It is said that they have been repealed, or contravened, or derogated from, because after the levy had been made some one else made a claim to the goods under a bill of sale, and, with a view to disposing of the rights of the adverse claimants, the sheriff took out an interpleader summons, on which Mr. Justice *Lopes* made an order that the goods should be sold and that the balance of the proceeds, after payment of expenses and paying £37 10*s*. into Court, should be paid to the execution creditor. The Judge, however, had no power upon that summons to interfere with the rights of

(1) Law Rep. 1 Ex. 307, n. (2) Law Rep. 1 Ex. 302.

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C. A. 1877 *Ex parte* HALLING. *In re* HAYDON.

the general creditors in a bankruptcy. The sheriff was already bound to sell the goods. The order could only deal with the rights of the rival claimants *inter se;* the rights of the general creditors remained wholly unaffected. I am unable to follow the reasoning of Baron *Bramwell* in *Parsons* v. *Lloyd* (1), but it was not a decision under the Act of 1869. If we were to accede to the Appellant's contention the result would be that a creditor would only have to seize goods upon which some one else had a sham claim, and to avail himself of that claim to defeat the operation of sect. 87. The appeal must be dismissed with costs.

Judgment, James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

The only proceeding before Mr. Justice *Lopes* was one between the execution creditor and the bill of sale holder. Some days after the order for sale was made the liquidation petition was filed, and that brought sect. 87 into operation, and its provisions at once became binding on all parties. The decision in *Parsons* v. *Lloyd* is only stated by way of a note to the report of *O'Brien* v. *Brodie* (2), and in the principal case Baron *Bramwell* said that (3) "the execution creditor certainly will, if he receives this money, receive it by virtue of an execution. Our judgment must therefore be against him, but I do not understand this to be inconsistent with the case (*Parsons* v. *Lloyd*) decided by me at Chambers." The facts stated in the note are not sufficient to enable me to form a satisfactory opinion, but I think that the case was decided simply upon sect. 184 of the Bankruptcy Act of 1849.

THESIGER, L.J.:—

Thesiger, L.J.

I am of the same opinion. I am at a loss to see how any order made between third parties can affect the rights or the obligations which arise under sect. 87.

Solicitor for Execution Creditor: *J. F. Terry.*
Solicitor for Trustee: *J. T. Hazeldine.*

(1) Law Rep. 1 Ex. 307, n. (2) Law Rep. 1 Ex. 302.
(3) Law Rep. 1 Ex. 307.

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C. A.

1877

Dec. 6.

Ex parte LOWS. *In re* LOWS.

Practice—Bankruptcy Appeal—Non-appearance of Appellant—Proof by Respondent of Service of Notice of Appeal.

When a bankruptcy appeal has been set down in the ordinary course and is in the day's paper for hearing, if the Appellant does not appear the Respondent is entitled to have the appeal dismissed with costs without giving any proof that he has been served with a notice of appeal.

Statement. THIS appeal was in the day's list of appeals for hearing. When it was called in its turn no one appeared on behalf of the Appellant.

Argument. *Winslow*, Q.C., and *Brough*, for the Respondent, asked that the appeal might be dismissed with costs.

[JAMES, L.J.:—Have you any affidavit of service of notice of appeal upon you? According to the old practice of the Court of Appeal in Chancery a Respondent could not, when the Appellant made default in appearing, have the appeal dismissed unless he proved that he had been served with a petition of appeal. I do not know what the practice in bankruptcy has been.]

The appeal is set down by the Appellant, and it comes into the paper in due course.

Judgment. JAMES, L.J.:—

I think we ought to dismiss the appeal with costs. It is set down by the Appellant. It comes into the paper in due course. The Appellant does not appear, but the Respondent is here; I think he is entitled to have the appeal dismissed.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors for Respondent: *Learoyd & Co.*

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Ex parte KELLY. *In re* SIMMONS.

C. A. 1877 Dec. 6.

Undischarged Bankrupt—Enforcing unpaid Debt against Bankrupt's Property —Deceased Bankrupt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 54—*Bankruptcy Rules*, 1870, *r.* 183.

Sect. 54 of the *Bankruptcy Act*, 1869, does not enable the Court to sanction proceedings under it against the estate of a deceased undischarged bankrupt.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 26th of August, 1871, *Joshua Simmons* was adjudicated a bankrupt on the petition of *E. R. Kelly*, who afterwards proved a debt of £194 2*s.* 6*d.* Including that debt, the unsecured debts of the bankrupt amounted to £240 10*s.* 6*d.* No creditor but *Kelly* attended at the times appointed for the meetings of the creditors, and the Registrar was appointed trustee. No estate was realized. The bankruptcy was closed on the 17th of December, 1873, but the bankrupt did not obtain an order of discharge. In April, 1877, he died. He had made a will, appointing executors and giving the residue of his property, after the payment of debts and pecuniary legacies, to his daughter. He left property of considerable value. On the 29th of June, 1877, *Kelly*, with the leave of the Court, served on the executors a notice of motion for an order declaring that the debt of £194 2*s.* 6*d.* due to him should be deemed to be a subsisting debt in the nature of a judgment debt, and ordering that the same might be enforced against the property or estate of the bankrupt in the hands of his executors, or either of them, under the will, by writ of execution or otherwise as the Court should direct, subject only as stated in the 54th section of the *Bankruptcy Act*, 1869, in that behalf, or that *Kelly* might be at liberty to institute proceedings in the Chancery Division of the High Court for the administration of the estate of the bankrupt. On the hearing of the motion by the Registrar on the 11th of July it was adjourned till the 27th of July, and it was ordered that notice in the form prescribed by the Rules should be inserted in the *London Gazette* and *Times* newspaper. On the adjourned

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C. A. 1877 — *Ex parte* KELLY. *In re* SIMMONS.

hearing the executors of the bankrupt appeared, as did also his daughter, who claimed to be a creditor subsequent to the bankruptcy. The Registrar dismissed the motion, on the ground that the sanction of the Court could not be given to any proceeding under sect. 54 after the death of the bankrupt. *Kelly* appealed.

Argument.

De Gex, Q.C., and *Doria*, for the Appellant:—

Sect. 54 (1) of the *Bankruptcy Act*, 1869, gives the Court power to make the order we ask for.

[JAMES, L.J.:—What jurisdiction have we over the executors?]

We ask in the alternative the leave of the Court to commence an action to administer the bankrupt's estate. We cannot do that without the leave of the Court of Bankruptcy.

[JAMES, L.J.:—Why do you require the leave of the Court of Bankruptcy for that? Sect. 54 means that the sanction of the Court is required to enable the sheriff to issue execution against the bankrupt's property as upon a judgment. You cannot issue execution against the executors.]

Under the old *Insolvent Debtors Act* the creditors of a deceased insolvent debtor were allowed to maintain a suit against his

(1) Sect. 54 provides, "Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:—

"1. No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up 10*s.* in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of 10*s.* in the pound had originally been paid out of his property.

"2. At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt, or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

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executors for the purpose of realizing and protecting his property acquired after the date of the insolvency: *Ward* v. *Painter* (1).

C. A. 1877 *Ex parte* KELLY. *In re* SIMMONS. Judgment, James, L.J.

E. C. Willis, for the executors, was not heard.

JAMES, L.J.:—

In *Ward* v. *Painter* the question was whether a suit could be maintained in the Court of Chancery. I do not see why you should not commence an administration action without any leave from the Court of Bankruptcy. It is quite clear that the meaning of sect. 54 is, that after the expiration of the three years, the unpaid debts may be enforced, like a judgment debt, by means of a writ of elegit or *fi. fa.* against the bankrupt's property, and this is to be done only with the sanction of the Bankruptcy Court. But after a man is dead his property can only be applied in payment of his debts in a due course of administration. And rule 183 of the Bankruptcy Rules, 1870, provides that notice of the hearing of an application under sect. 54 is to be served "personally on the bankrupt," which shews that the section was not meant to authorize proceedings against the property of a deceased bankrupt. The Court has no power to authorize execution to be issued against the executors. The appeal must be dismissed with costs.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor for Appellant: *W. Kelly.*
Solicitor for Executors: *J. B. Pittman.*

(1) 5 My. & Cr. 298.

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M. R.

1877

Nov. 26.

BODDY *v.* WALL.

[1877 B. 289.]

Practice—Statement of Defence—Amended Statement of Claim—Pleading last delivered—Course open to Defendant.

Where a Plaintiff has amended his statement of claim after delivery of statement of defence, and, no other pleading having been delivered, moves for judgment on amended statement of claim, the Defendant may either obtain leave to amend his defence, or put in a new defence, or he may proceed with his original defence, in which case the amendments in the amended statement of claim will be taken to be admitted and the statement of defence will stand as an answer *pro tanto*.

Durling v. *Lawrence* (1) not followed.

Statement.

THE Plaintiffs in this case had delivered their statement of claim, and after the statement of defence had been put in they delivered an amended statement of claim, the amendments being confined to a few particulars not of a material character. The Defendant delivered no new or amended statement of defence. The Plaintiffs then moved for judgment on the amended statement of claim, that being the last pleading delivered.

The question arose on the pleadings what was the proper course to be adopted by the Defendant in such a case.

Argument.

Ince, Q.C., and *C. H. Turner*, for the Plaintiffs:—

In this case, as the amended statement of claim was the pleading last delivered, the statements therein must be taken to be admitted, according to Rules of Court, 1875, Order XXIX., rule 12. In *Durling* v. *Lawrence* (1) where a re-amended statement of claim by the Plaintiff was the last pleading delivered, and the Defendants had given notice that they did not intend to re-amend their statement of defence, on motion to dismiss for want of prosecution your Lordship held that two courses were open to the Defendant: he might either put in a new defence, or obtain leave, under Order XXVII., rule 5, to amend his original defence. In that case, as it appeared that the Plaintiff was not in default, the motion was refused.

(1) Weekly Notes (1877), 182.

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Chitty, Q.C., and *B. B. Rogers*, for the Defendant, referred to the *Common Law Procedure Act*, 1852, s. 90.

M. R. 1877 BODDY v. WALL. Judgment.

JESSEL, M.R.:—

I am not disposed to follow *Durling* v. *Lawrence* (1). There is no rule expressly applicable to such a case as the present; I must, therefore, follow the old practice prevailing either at common law or in the Court of Chancery. According to the old practice at common law a plea remained although the declaration was amended, and the Defendant, if so advised, went to trial on his original plea to meet the amended declaration. So, by the old practice of the Court of Chancery, if, after answer, the Plaintiff amended his bill, and did not require a further answer, he gave notice to the Defendant and proceeded to trial without a further answer, the Defendant having the right still to put in a further answer. If the Defendant did not exercise that right, the trial proceeded on the original answer and amended bill. Following the old practice, I consider that the Defendant is entitled to choose whether he will obtain leave to amend his defence, or put in a new defence, or proceed with his original defence. If the Defendant adopts the last course the amendments in the statement of claim will of course be taken to be admitted, and the defence will stand as an answer *pro tanto*. I consider that this will be a reasonable practice to adopt.

The Defendant then elected to proceed on his original defence, and treat the case as if issue had been joined, and upon this issue the Court gave judgment for the Plaintiffs on certain points, and for the Defendant on others.

Solicitors: *Walter Jarvis & Triscott; T. L. Allen.*

(1) Weekly Notes (1877), 182.

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M. R.

1877

Nov. 16, 30.

CAMPBELL *v.* HOLYLAND.

[1876 C. 104.]

Mortgagor and Mortgagee — Foreclosure Decree — Order Absolute — Adding Parties after — Opening Foreclosure — Practice — Motion — Service on Party having no Interest — Appearance by Counsel — Costs.

If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute:

Thus, where, after decree in a foreclosure action the mortgagor's interest had been purchased by *A.*, and the mortgagee's interest by *B.*, and an order was afterwards made for foreclosure absolute on an *ex parte* application by the Plaintiff, the mortgagee, *A.* and *B.* were, on motion by *A.*, ordered to be made co-Defendants, and a subsequent motion by *B.* to discharge that order as irregular on the ground that the action was, in fact, at an end, was refused.

In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the Court, and depends on the circumstances of each particular case.

The general nature of the circumstances under which foreclosure may be opened, considered.

A party who has been served with a notice of motion, but has no interest in the subject-matter, is not entitled to appear by counsel on the motion merely to ask for his costs.

Thus, where the Plaintiff in a foreclosure action, who had parted with his interest, had been served with a notice of motion to re-open foreclosure absolute, and appeared by counsel on the motion and asked for his costs, he was held not to be entitled to his costs of appearance; but inasmuch as, upon his being served with the notice of motion, no intimation was given him that he need not appear, and no tender was made to him of his costs of being advised as to the effect of the motion, he was allowed 40*s.* costs.

Statement.

THIS case came before the Court on two motions relative to the reopening of a foreclosure decree, under the following circumstances:—

Under the marriage settlement, dated the 30th of December, 1856, of *Alexander Theophilus Blakely* and *Harriette Catherine* his wife, *Blakely* was absolutely entitled to a sum of £7188 9*s.* 4*d.*, Reduced Three per Cent. Annuities, subject to his wife's life interest therein and to her general power of appointment over £500, part thereof.

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By an indenture of mortgage dated the 16th of October, 1867, and made between *Blakely* of the one part, and *Robert Campbell* of the other part, *Blakely* mortgaged his reversionary interest in the fund to *Campbell* for £1000, with interest at 7 per cent. per annum.

In 1868 *Blakely* died insolvent, and in 1869 administration to his estate was granted to the Defendant *Holyland*.

In March, 1876, this action was instituted by *Campbell* against *Holyland* for foreclosure of the mortgage, and the usual foreclosure decree was made on the 6th of May, 1876.

On the 4th of July, 1876, the Chief Clerk certified that the sum of £1523 7*s*. 4*d*. would be due to the Plaintiff *Campbell* under his mortgage, for principal, interest, and costs, on the 4th of January, 1877, the day on which the period of six months appointed by the decree for payment would expire.

On the 26th of October, 1876, the equity of redemption in the fund was, with the approval of the Judge, sold and assigned for £100 to two persons named *Mayhew* and *Graham*, and about the same period negotiations by letter passed between *Campbell* and Messrs. *Mayhew* and *Graham* for the purchase by them of *Campbell's* interest as mortgagee for the sum of £800 and costs.

On the 4th of January, 1877, Messrs. *Mayhew* and *Graham's* solicitor met *Campbell* at the time and place appointed by the foreclosure decree for payment of the mortgage debt, and stated that as his clients had purchased the mortgagee's interest he did not attend for the purpose of paying the debt, but that his clients considered themselves liable for payment of the purchase-money, and were willing to complete the purchase accordingly.

To this statement it appeared *Campbell* made no reply.

Subsequently, Messrs. *Mayhew* and *Graham* discovered that on the previous day, the 3rd of January, *Campbell* had sold his interest to a Mr. *Ford*, a solicitor, for £1000, *Ford* being at the time aware of the negotiations that had already passed between *Campbell* and Messrs. *Mayhew* and *Graham*.

Messrs. *Mayhew* and *Graham*, then, on the 22nd of January, 1877, brought an action against *Campbell* (*Graham* v. *Campbell* [1877 G. 15]) for specific performance of his alleged agreement for sale to them; but Vice-Chancellor *Malins*, by whom the

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action was tried, on the 25th of July, 1877, dismissed it on the ground that *Ford* had the better title, and that the Plaintiffs had failed to prove any binding contract as between themselves and *Campbell*.

Statement.

On the 11th of January, 1877, the decree in the foreclosure action was made absolute, upon an *ex parte* application made by *Campbell*, at *Ford's* instance. The transactions which had taken place relative to the sale of the interest of the mortgagor and mortgagee were not then brought to the notice of the Court, but the application was founded upon an affidavit by *Campbell* stating simply that the Defendant *Holyland*, the mortgagor, had not attended to pay the mortgage debt on the appointed day, and that the whole of the debt still remained due to the Plaintiff.

On the 15th of July, 1877, *Graham* died, having by will appointed two persons his executors, who duly took out administration to his estate.

On the 2nd of November, 1877, being the first day of the Michaelmas Sittings, *Mayhew* and *Graham's* executors, as a preliminary step to applying to have the foreclosure decree reopened, moved *ex parte* that they and *Ford* should be added as Defendants to the action, and that the proceedings in the action should be carried on between the Plaintiff and the original Defendant and such new Defendants as if they had been originally Defendants; and on the same day an order was made to that effect.

On the 16th of November, 1877, *Ford* moved to discharge the last-mentioned order.

Argument.

Bagshawe, Q.C., and *Bush*, in support of the motion, contended that the action was at an end; that there were therefore no proceedings which could be continued; and that the order of the 2nd of November, 1877, was irregular and ought to be discharged. They referred to *Patch* v. *Ward* (1).

Chitty, Q.C., and *Rendall*, for *Mayhew* and *Graham's* executors, *contrà*, were not called upon.

Judgment.

JESSEL, M.R.:—

I think the order of the Court which is sought to be set aside

(1) Law Rep. 3 Ch. 203.

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Judgment.

must stand. An order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute, nor can it be so now. In cases of great hardship a mortgagor might have obtained further time for payment, and the suit was allowed to go on after decree. The decree, though final in terms, was not final in fact, and the suit could not be considered as terminated.

The practice is that if in a foreclosure action one of the parties assigns his interest, and the other party thinks it right to have the assignee before the Court, the assignee is not entitled to object, as it is desirable in all litigation to have all the parties interested before the Court. In this case it is better for the purchaser from the mortgagee, who is the person really interested, as well as for everybody else, that he should conduct his own case. It seems to me, therefore, having regard to the nature of the litigation, that he ought to remain before the Court. The motion must be refused, but as the case is a novel one the costs will be costs in the action.

Statement.

Nov. 30. The case came again before the Court on a motion by the Defendants *Mayhew* and *Graham's* executors to reopen the foreclosure decree.

It appeared that on the 12th of November, 1877, these Defendants made a tender by letter to their co-Defendant *Ford* of the amount of the mortgage debt and costs, with a request for the re-assignment of the mortgaged property. *Ford*, however, declined to make any re-assignment, whereupon his co-Defendants now moved to reopen the foreclosure decree by asking that he might be ordered to re-assign the mortgaged property to them on payment within ten days of the mortgage debt of £1523 7*s.* 4*d.*, interest and costs.

In an affidavit filed by *Mayhew* in support of the motion, he stated that the right of redemption now claimed by himself and *Graham's* executors was a very valuable one, not only on account of the intrinsic value of the reversion itself, but also by reason of the advantageous position it would give them in certain other litigation now pending relative to this very fund.

Ford, on the other hand, stated by affidavit that his special object in purchasing *Campbell's* interest as mortgagee was to make over the benefit of the purchase—as he intended to do—to Mrs.

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Blakely, the present tenant for life of the fund, she being an old friend and client of his.

Chitty, Q.C., and *Rendall*, for the motion:—

The order for foreclosure absolute was obtained irregularly, and therefore cannot stand.

[They were stopped by the Court.]

Bagshawe, Q.C., and *Bush*, for *Ford*:—

The mortgagors were not ready with their money on the appointed day, and that, we submit, is a sufficient answer to this motion; the rule being that after the order for foreclosure has been made absolute it must be shewn that the person who seeks to set it aside fully intended and was prepared to pay the money on the day, but was estopped by some accident from doing so; otherwise he can only be relieved on the ground of fraud: *Patch* v. *Ward* (1). No fraud, however, is alleged in the present case: the utmost that can be said is that there may have been irregularity; but in *Patch* v. *Ward* the order was obtained irregularly, and yet the Court of Appeal held that an insufficient ground for setting it aside. The Court will not even entertain an application to enlarge the time for redemption without some satisfactory reason being given by the mortgagor for non-payment at the appointed day: *Nanny* v. *Edwards* (2). Moreover, if a mortgagor desires to have a foreclosure decree opened, he must come promptly; he cannot lie by and let the mortgagee deal with the property as his own, and then come and offer to redeem: *Thornhill* v. *Manning* (3).

Now, in the present case, the mortgagors must be taken to have known as long ago as the 4th of January, 1877, that the result of their non-payment of the mortgage debt on that day would be an order for foreclosure absolute, and the order was in fact made on the 11th of January; yet until now, that is, until after a lapse of nine months, they never applied either for enlargement of the time for redemption, or for opening the foreclosure. Having elected to stand on their alleged purchase of the mortgagee's inte-

(1) Law Rep. 3 Ch. 203, 212. (2) 4 Russ. 124.
(3) 1 Sim. (N.S.) 451, 454.

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rest instead of on their right to redeem, and having been defeated in their attempt to enforce their supposed contract, it is now too late for them to come and ask to have the foreclosure opened. If a mortgagor can have foreclosure opened in such a case as this where the mortgagee has parted with his interest under the order absolute to a purchaser for value, no purchaser's title under such an order can ever be considered safe.

JESSEL, M.R.:— Judgment.

I have no doubt that I ought to make the order asked for.

The question in dispute is really whether a mortgagor can be allowed to redeem after an order of foreclosure absolute, and I think, on looking at the authorities, that no Chancellor or Vice-Chancellor has ever laid down that any special circumstances are essential to enable a mortgagor to redeem in such a case.

Now what is the principle? The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and it must be remembered that the doctrine arose at the time when mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract between the parties; yet Courts of Equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and that the mortgage money should be debt; and they gave relief in the shape of redemption on that principle. Of course that would lead, and did lead, to this inconvenience, that even when the mortgagor was not willing to redeem, the mortgagee could not sell or deal with the estate as his own, and to remedy that inconvenience the practice of bringing a foreclosure suit was adopted, by which a mortgagee was entitled to call on the mortgagor to redeem within a certain time, under penalty of losing the right of redemption. In that foreclosure suit the Court made various orders—interim orders fixing a time for payment of the money—and at last there came the final order which was called foreclosure absolute, that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the

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original deed was form only; for the Courts of Equity soon decided that, notwithstanding the form of that order, they would after that order allow the mortgagor to redeem. That is, although the order of foreclosure absolute appeared to be a final order of the Court, it was not so, but the mortgagee still remained liable to be treated as mortgagee and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the Court. Therefore everybody who took an order for foreclosure absolute knew that there was still a discretion in the Court to allow the mortgagor to redeem.

Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.

That being so, on what terms is that judicial discretion to be exercised? It has been said by the highest authority that it is impossible to say *à priori* what are the terms. They must depend upon the circumstances of each case. For instance, in *Thornhill* v. *Manning* (1) Lord *Cranworth* said you cannot lay down a general rule. There are certain things laid down which are intelligible to everybody. In the first place the mortgagor must come, as it is said, promptly; that is, within a reasonable time. He is not to let the mortgagee deal with the estate as his own—if it is a landed estate, the mortgagee being in possession of it and using it—and then without any special reason come and say, "Now I will redeem." He cannot do that; he must come within a reasonable time. What is a reasonable time? You must have regard to the nature of the property. As has been stated in more than one of the cases, where the estate is an estate in land in possession—where the mortgagee takes it in possession and deals with it and alters the property, and so on—the mortgagor must come

(1) 1 Sim. (N.S.) 451, 454.

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much more quickly than where it is an estate in reversion, as to which the mortgagee can do nothing except sell it. So that you must have regard to the nature of the estate in ascertaining what is to be considered reasonable time.

Then, again, was the mortgagee entitled to redeem, but by some accident unable to redeem? Did he expect to get the money from a quarter from which he might reasonably hope to obtain it, and was he disappointed at the last moment? Was it a very large sum, and did he require a considerable time to raise it elsewhere? All those things must be considered in determining what is a reasonable time.

Then an element for consideration has always been the nature of the property as regards value. For instance, if an estate were worth £50,000, and had been foreclosed for a mortgage debt of £5000, the man who came to redeem that estate would have a longer time than where the estate was worth £5100, and he was foreclosed for £5000. But not only is there money value, but there may be other considerations. It may be an old family estate or a chattel, or picture, which possesses a special value for the mortgagor, but which possesses not the same value for other people; or it may be, as has happened in this instance, that the property, though a reversionary interest in the funds, is of special value to both the litigants: it may possess not merely a positive money value, but a peculiar value having regard to the nature of the title and other incidents, so that you cannot set an actual money value upon it. In fact, that is the real history of this contest, for the property does not appear to be of much more money value—though it is of some more—than the original amount of the mortgage. All this must be taken into consideration.

Then it is said you must not interfere against purchasers. As I have already explained, there are purchasers and purchasers. If the purchaser buys a freehold estate in possession after the lapse of a considerable time from the order of foreclosure absolute, with no notice of any extraneous circumstances which would induce the Court to interfere, I for one should decline to interfere with such a title as that; but if the purchaser bought the estate within twenty-four hours after the foreclosure absolute, and with

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notice of the fact that it was of much greater value than the amount of the mortgage debt, is it to be supposed that a Court of Equity would listen to the contention of such a purchaser that he ought not to be interfered with? He must be taken to know the general law that an order for foreclosure may be opened under proper circumstances and under a proper exercise of discretion by the Court; and if the mortgagor in that case came the week after, is it to be supposed a Court of Equity would so stultify itself as to say that a title so acquired would stand in the way? I am of opinion it would not.

Now I come to the circumstances of this case, and I must say they are very strong in favour of opening the foreclosure. As I said before, it is a sum of money in reversion, the title to which, no doubt, is to some extent in dispute, but which both parties are very desirous to possess for special reasons of their own. It appears to have a special value as well for the purchaser as the mortgagor. The intrinsic money value was thought by the parties at the time of the negotiations I am about to mention, to be really less than the mortgage debt; the mortgage money was carrying 7 per cent. interest, and negotiations were entered into by the mortgagor—or the persons standing in the position of mortgagor—with the mortgagee not to redeem in terms, but to buy up the mortgage for a less sum. Those negotiations were supposed by the mortgagor to have resulted in an agreement to purchase, and acting under that belief he did not attend at the day with the money to pay off the mortgage, but he came and told the mortgagee he was willing to pay the purchase-money for the mortgage and keep the property.

Now, what happened in the meantime? The present purchaser, Mr. *Ford*, being very desirous to acquire the property for a collateral object—I am not saying a wrong object, but a collateral object—had, before the time for foreclosure absolute had arrived, entered into a contract with the mortgagee to buy it. He was not a purchaser coming in even the day after foreclosure, but a purchaser coming in before foreclosure, and at that time of course he knew the property was redeemable. He bought a property certainly redeemable, for the day for redemption had not even arrived. That is the kind of purchase I am dealing with. He

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was aware on the day of redemption that it was not from unwillingness to redeem that the mortgagor failed to pay the money, but because the mortgagor was under the belief that he had acquired a right to take the property on paying less than the mortgage money, by reason of a contract of purchase with the mortgagee. What happened next? The mortgagor endeavoured by suit in Equity to enforce his contract to purchase. That came on for hearing before Vice-Chancellor *Malins* in July, and then the Vice-Chancellor decided that Mr. *Ford*, the present purchaser, had the better title, and the mortgagor failed in enforcing his agreement for purchase with the mortgagee. On the 2nd of November, as soon as the Courts opened after the Long Vacation, the motion to revive the suit and enable the redemption motion to come on was made, and very shortly after that this motion was made which I have now to decide.

I think, under these circumstances, that the mortgagor has been sufficiently prompt. I entirely agree with the various authorities which have been quoted, that reasonable promptness ought always to be shewn. I say reasonable promptness, because what is promptness is, as I have said, not an abstract proposition, but must depend on the circumstances of the case. I think the mortgagor has been sufficiently prompt. I think the purchaser is not in a position to terrorize the Court as to the evils that would happen by opening a foreclosure after sale. As I said before, I by no means say that the fact of a sale would not be an important fact; it ought to weigh with the Court in opening foreclosure.

I am of opinion, however, that such a sale as this ought to have no weight whatever, and that under the circumstances the mortgagor is entitled to open the foreclosure on the usual terms, that is, on payment of principal, interest, and costs.

Waller, Q.C., and *Dundas Gardiner*, for the Plaintiff, who had been served with the notice of motion, now asked for their costs.

JESSEL, M.R.:—

I have said many times since I have had the honour of a seat on the Bench, that I do not recognise what some Judges have said is the rule, that every party served is entitled to appear merely

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to ask for his costs. It does not appear to me that, in any event, the Plaintiff could have any interest whatever in this question, and therefore I shall not give him any costs of appearance.

Waller then urged that the Plaintiff was at least entitled to 40*s.* costs, inasmuch as, when he was served with the notice of motion, no intimation was given that he need not appear, and no tender was made to meet the cost of being advised as to the effect of the notice.

Chitty, contrà.

JESSEL, M.R.:—

I think the Plaintiff is entitled to 40*s.* costs, and I shall, therefore, order that sum to be paid to him.

Solicitors: *Mayhew, Salmon, & Whiting; W. & A. R. Ford; Dawson, Bryan, & Dawson.*

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In re SANDERSON.

Administration Action—Equity of Redemption—Costs—Taxation—Higher or Lower Scale—Additional Rules of Court, August, 1875, *Order* VI., *r.* 1.

In administration actions, where the gross value of the estate to be administered amounts to £1000 at the time of the institution of the action, the higher scale of costs applies: and in estimating such value where the estate to be administered comprises an equity of redemption, the value of the equity of redemption only, and not of the entire mortgaged estate, is to be regarded. If, however, in such a case the equity of redemption has been valued at the time of the institution of the action at such a sum as, with the rest of the estate to be administered, amounts to £1000 or upwards, but it afterwards turns out, on a sale by the mortgagees, that the proceeds of such sale, together with the rest of the estate to be administered, amount to less than £1000, the lower scale applies.

In re Reece's Estate (1) explained.

Statement.

THIS was a summons asking that the Taxing Master might be directed to review his taxation of a solicitor's bill of costs in an administration action, by allowing costs on the lower instead of

(1) Law Rep. 2 Eq. 609.

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the higher scale, on the ground that the value of the estate sought to be administered by the action was under £1000, within the meaning of Order VL, rule 1, of Additional Rules of Court, August, 1875.

Statement.

In 1874 a creditor's action was instituted for the administration of the estate of a testator, *Richard Ainge*, the Defendant in the action being his widow and administratrix. At that time the assets consisted of personal estate to the amount of £561, and of the equity of redemption in certain real estate which had been valued on behalf of the administratrix at £1900, but was subject to mortgages to the amount of £1200.

The real estate was afterwards sold by the mortgagees, but did not produce enough to pay the whole of the mortgage debts. The gross amount, however, produced by the sale, with the £561, exceeded £1000.

A Mr. *Sanderson* had been employed by the Defendant, Mrs. *Ainge*, as her solicitor during the progress of the action, but wishing to employ another solicitor, she obtained an order on petition requiring *Sanderson* to deliver his bill of costs, and directing the usual reference for taxation.

In making the taxation the Taxing Master taxed the costs on the higher scale, whereupon Mrs. *Ainge* raised the objection that they should only have been allowed on the lower scale, on the ground that the total value of the estate sought to be administered was under £1000.

The Taxing Master, however, considering that he was bound by Lord *Romilly's* decision in *In re Reece's Estate* (1), overruled the objection. This summons was then taken out by Mrs. *Ainge*, by way of appeal from the Taxing Master's decision, and ordered to be adjourned into Court for argument.

The new Order (Order VI., rule 1, of Additional Rules of Court, August, 1875), is in substantially the same terms as the old Regulations of the Court as to solicitors' fees and charges (Cons. Ord. p. 195).

Argument.

Terrell, for the summons:—

At the time this action was commenced the real estate to be

(1) Law Rep. 2 Eq. 609.

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administered was the equity of redemption, and nothing more. That, with the personalty, constituted the assets, and all the realty that the parties to the suit were entitled to deal with was the equity of redemption, which has turned out to be valueless.

Argument.

The decree for sale of the real estate in such an action as this always directs a sale subject to any mortgage, unless the mortgagee comes in and concurs in a sale, in which case the mortgagee is paid in full out of the proceeds. This shews that all that can be administered at the suit of the Plaintiff is the equity of redemption. Lord *Romilly's* decision in *In re Reece's Estate* (1) cannot, I submit, be considered an authority, for the same solicitors appeared for both parties; the counsel for both Plaintiff and Defendant argued in favour of the higher scale, and the opposite view was not argued at all. There the mortgage debt was paid off by the executor pending the suit, but the distinction between mortgage and other debts was not considered. The scale to be applied does not depend upon the course the mortgagee may choose to take after the institution of the action, but upon the value of what is to be taken as assets at the time the action is instituted. It would seem clear that a mortgage or charge on an estate to the payment of which as a debt the deceased was not liable, would necessarily be deducted.

Hamilton Humphreys, for *Sanderson*:—

I submit the taxation was perfectly correct. The equity of redemption was, at the time the action was instituted, worth £700, according to the valuation obtained by the administratrix, so that the total value of the whole estate to be administered in the action was over £1000. What the value of the equity of redemption has since turned out to be is immaterial.

The decision in *In re Reece's Estate* has been acted upon for eleven years, and ought not now to be disturbed.

Judgment.

JESSEL, M.R.:—

I am of opinion that the Taxing Master is wrong in taxing these costs on the higher scale, although he is right in his interpretation of Lord *Romilly's* decision.

(1) Law Rep. 2 Eq. 609.

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The first part of rule 1, Order VI. (Additional Rules of Court, August, 1875), relates to the administration of property. Now when the Court administers the estate of a testator which is subject to a mortgage, that is, an estate in which he had only the equity of redemption, what is administered is not the whole of the estate, but only that which the testator had, namely, the equity of redemption, though in case of a sale being directed the mortgagee may come in and concur, and so get paid. That this is so becomes plainer when you look at the second part of the rule, as to the execution of trusts "in which the trust estate or fund shall be under the amount or value of £1000." Supposing the "trust estate" consisted of an equity of redemption only, could it be said that the value of the mortgagee's interest must be taken into account? Supposing a man has property worth £2000, and he mortgages it for £1500, all he can get on a sale is £500, for the remainder belongs to the mortgagee. If, then, an action were brought for the administration of his estate, how could it be said that his interest in the mortgaged property was worth more than what he could get, namely, the £500? That is the way in which the whole of the rule should be read. What the rule means is that the lower scale shall apply when the property dealt with is of such an amount or value as that a Plaintiff must, in any event, get a sum under £1000.

Now I should have felt no doubt at all upon the point had it not been for the case of *In re Reece's Estate* (1). Looking at that case, I may observe, in the first place, that the head-note itself is right. The note is this: "In administration suits, where the gross value of the estate to be administered amounts to £1000 at the time of the institution of the suit, the higher scale of costs applies." There the suit was a creditor's suit for the administration of a testators' estate subject to a mortgage; therefore what was sought to be administered was what he had, namely, his equity of redemption. In taxing the costs the Taxing Master had taxed according to the lower scale, and a summons was taken out by both Plaintiff and Defendant for the purpose of having the costs allowed on the higher scale. Now comes the remarkable part of the case. The same firm of solicitors ap-

(1) Law Rep. 2 Eq. 609.

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peared for both the Plaintiff and Defendant; both counsel argued the same way, and the only point submitted to Lord *Romilly* was that the lower scale referred to the gross value at the time of the institution of the suit, and not to the ultimate net value after deducting payments made after the suit had been instituted. But the real difficulty in the case was not brought to Lord *Romilly's* attention at all, and accordingly he passes it over in his judgment. He says: "I am of opinion that the lower scale applies where the gross value of the estate to be administered is below £1000 at the time when the suit is instituted, and not where the net value is below that amount."

Now I entirely agree that you are to have regard to the gross value of the estate which is to be administered, but Lord *Romilly* does not say how you are to apply the scale when the estate to be administered is an equity of redemption only. A man may have property worth £100,000, but if it is in mortgage, all he has actually belonging to him, that is, all that can be administered as his estate, is the equity of redemption, which may be almost valueless. How then could you say his estate was worth £100,000? Lord *Romilly* never did decide this point, and his attention was not called to it. That case therefore cannot be considered an authority, and I shall not follow it. The rule is rightly laid down in the judgment, though it is wrongly applied to the facts.

There must be a reference back to the Taxing Master to review his taxation, by making it on the lower scale. I make no order as to costs.

Solicitors: *T. E. Watkin; Tibbitts & Co.*

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WILLIS *v.* KYMER.

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[1861 W. 251.]

Will—Precatory Trust for "Children"—Execution of Trust—Power of Trustee to limit to "separate use."

Where a precatory trust has been created by will in favour of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use.

ADJOURNED SUMMONS.

Statement.

Mary Ann Kymer, who died in 1829, by her will, dated the 17th of June, 1824, after requesting her sister *Eliza Kymer* to perform her wishes as therein expressed, bequeathed various legacies to her brothers and sisters and their children, including a legacy of £3000 to her brother *John Kymer* for life, "the principal to be divided at his death between his children, *John*, *Sophia*, and *Mary Ann*."

On the 7th of October, 1828, the testatrix executed a codicil as follows:—"I bequeath to my sister *Eliza* all I possess, requesting at her death she will leave the sums as I have directed heretofore."

Eliza Kymer, by her will, dated the 19th of May, 1859, after reciting that she was desirous that the bequests and requests of her said sister *Mary Ann* should be carried into effect as far as might be, whether she was bound to carry them into effect or not, confirmed the several bequests of money made and requested to be paid by her said sister's will, and declared that the trustees of her will should, out of any estate and effects belonging to her at her decease, and whether originally forming part of her said sister's estate or not, raise the several legacies by her said sister's will and codicil bequeathed or requested to be paid to or in trust for each of her brothers and sisters and their children, and should pay and apply the same accordingly, in order so far as possible to carry into effect the wishes and requests of her said sister with reference thereto as expressed in her said will and codicil. The testatrix then, after bequeathing various legacies and disposing of the

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residue of her estate, declared that "in the event of any of the female legatees under that her will being married at the time of her decease, their respective legacies or shares of residue under that her will should be for their respective separate use, independent of their respective husbands, and their respective receipts alone should be good discharges for all moneys thereinbefore directed to be paid to them."

The testatrix, *Eliza Kymer*, died on the 26th of February, 1861, and shortly afterwards this action was instituted and the usual decree made for the administration of the estates of herself and her sister *Mary Ann Kymer*.

In 1842, in the lifetime of *Eliza Kymer*, *Sophia Kymer*, one of the daughters of *John Kymer*, the tenant for life of the £3000 legacy, married *David Wilson*, and by the settlement made upon her marriage, covenanted with trustees to settle her after-acquired property, "except any estates or interests which should be limited to her separate use."

Mrs. *Wilson* survived *Eliza Kymer* and died on the 21st of May, 1870, having made a will appointing her husband her sole legatee and executor, and he subsequently took out administration to her estate.

John Kymer, the tenant for life, died in January, 1877, whereupon the question arose whether Mrs. *Wilson's* share of the £3000 legacy was bound by the covenant in her marriage settlement; in other words, whether the share had been properly limited to her separate use by *Eliza Kymer's* will, so as to fall within the exception to the covenant.

The question was raised by a summons taken out by Mr. *Wilson* asking for payment of the share—consisting of £1031 13*s.* cash in Court—to him as his wife's legal personal representative.

By an order made on further consideration it had been declared that *Mary Ann Kymer's* will and codicil constituted *Eliza Kymer* a trustee.

Argument.

W. C. Fooks, for the summons:—

If Mrs. *Wilson's* share was properly limited to her separate use it unquestionably falls within the exception to the covenant in her marriage settlement. But the question is whether, inasmuch

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as the precatory trusts created by *Mary Ann Kymer's* will and codicil in favour of *John Kymer's* children prescribed no limitation to separate use, *Eliza Kymer*, as the trustee, was capable of executing the trust as she has done, by adding such a limitation. There appears to be no express authority upon the point, but I submit that *Eliza* did not exceed her powers, for the limitation to separate use as to the daughter's shares was nothing more than a proper mode of carrying out her sister's intention that the daughters should take for their own benefit.

S. A. Bennett, for the trustees of the settlement, submitted that as *Eliza* was a mere trustee she had no power to superadd to *Mary Ann Kymer's* bequest the condition of separate use.

Judgment.

JESSEL, M.R.:—

The question is whether, where a precatory trust has been created by will in favour of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use.

This, as far as I know, is a new point; but I must say, having regard to the principle on which the Court proceeds with respect to precatory trusts, that is, looking, as I do in the present case, at the intention of the testatrix *Mary Ann Kymer*, I do not feel any doubt upon the subject. I am of opinion that *Eliza* had power to attach a limitation to separate use.

It has been held in the action that this was a precatory trust vested in *Eliza;* in other words, that she was bound to dispose of the money as directed by her sister. *Eliza* has done so by her will by directing that the money shall be paid and applied to or for the benefit of her brother and his children, in order, as far as possible, to carry out her sister's wishes. But she has gone on to say that in the case of female legatees who may be married at her decease their shares under her will shall be for their separate use.

Now, the original will and codicil say nothing about separate use. They merely direct her to leave the money, after her brother's death, to his children, and nothing more. She is, therefore, bound not to make a different disposition. Well, she has

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conformed to that direction by leaving the money to the children, and in doing so has taken care to dispose of it in such a manner that the shares of the daughters shall, in case of their marriage, still remain for their own benefit, thus effectually carrying out her sister's intention.

I am of opinion, therefore, that *Eliza* has complied with the directions contained in her sister's will, and accordingly that Mrs. *Wilson's* share falls within the exception to the covenant in her marriage settlement. The fund will, therefore, be paid to her husband.

Solicitors: *Wilson, Bristows, & Carpmael; R. Quick.*

M. R. 1877 Dec. 8.

In re MERCERON.

General Metropolitan Paving Act (57 *Geo.* 3, *c.* xxix.), *ss.* 84, 89—*Interim Investment of Purchase-money—Petition—Costs.*

The Court has jurisdiction, under sects. 84 and 89 of the *General Metropolitan Paving Act*, to order payment of the costs of an interim investment in consols (including the costs of a petition for the purpose) of purchase-money of land taken by a board of works under the powers of the Act.

In re Saunders' Estate (1) considered.

Statement.

THIS was a petition by the trustees of the will of *Henry Merceron*, deceased, and two of the beneficiaries, for the interim investment in consols of a sum of £600 cash, which had been paid into Court by the *Limehouse* Board of Works on the purchase by them of part of the testator's real estate, under the *General Metropolitan Paving Act*, 1817 (57 Geo. 3, c. xxix.). The petition also prayed that, pursuant to sect. 89 of that Act, the board might be ordered to pay the costs of the investment and of the petition.

The only question was whether the Court had jurisdiction under the Act (sects. 84 and 89) to order the board to pay the costs of and relating to such investment (2).

(1) Law Rep. 8 Eq. 681.

(2) Sect. 84 of the *Metropolitan Paving Act* (57 Geo. 3, c. xxix.) enacts that purchase-money amounting to £200 paid for the purchase of lands belonging to persons under disability shall be paid into Court to be applied in the discharge of incumbrances or the "purchase" of

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A. T. Watson, for the Petitioners:—

I rely on *In re Saunders' Estate* (1), where Lord Justice *James*, when Vice-Chancellor, held, upon this very Act, that a vestry taking lands under the powers of the Act were liable to pay the costs of a petition for payment out of Court of the purchase-money. I admit that Lord *Westbury's* decision the other way, in *Ex parte Vicar and Churchwardens of St. Sepulchre's* (2), was not cited.

I submit, however, even if *In re Saunders' Estate* went too far, on the construction of the two sections, that investments come within the literal meaning of "purchases from time to time."

Ratcliff, for the Respondents, the Board of Works:—

The 84th section of the Act distinguishes between purchase and investment, and I submit that under sect. 89 the board are only liable to pay the costs of "purchases," not of "investments." In addition to Lord *Westbury's* decision, *In re Harrison's Estate* (3) and *In re Williams' Estate* (4) are also authorities against the Petitioners' contention.

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other lands to be settled to the same uses as the lands taken; "and in the meantime and until such purchase shall be made, the said money shall, by order of the Court of Chancery, upon application thereto, be invested by the Accountant-General, in his name, in the purchase of £3 per Centum Consolidated, or £3 per Centum Reduced Annuities; and in the meantime and until the said Bank Annuities shall be ordered by the said Court to be sold for the purposes aforesaid," the dividends are to be paid to the persons who would for the time being have been entitled to the rents of the lands if and when purchased.

Sect. 89 is as follows: "Provided also and be it further enacted, that where by reason of any disability or incapacity of the person or persons or corporation entitled to any lands, tenements, or hereditaments to be purchased, or purchased under the authority of this Act, the purchase-money for the same shall be required to be paid into the Court of Chancery, and to be applied in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses in pursuance of this Act, it shall be lawful for the said Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said commissioners or trustees, or other persons as aforesaid, who shall from time to time pay such sums of money for such purposes as the said Court shall direct."

(1) Law Rep. 8 Eq. 681.
(2) 33 L. J. (Ch.) 372.
(3) Law Rep. 10 Eq. 532.
(4) Ibid. 12 Eq. 488.

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M. R. JESSEL, M.R.:—

1877

In re MERCERON.

Judgment.

The real question I have to decide is as to the construction of the *General Metropolitan Paving Act*. Now, this is the first time, so far as I am aware, that the Respondents to a petition of this kind have, with a view to escaping costs, asked the Court not to adopt the literal construction of the particular Act which may be in question: there have been many instances in which the Respondents have in such cases asked the Court not to depart from the literal construction on the ground that such a construction, if adopted, would be productive of injustice.

Now what does the Act do? It does this. The 84th section enacts as follows:—[His Lordship read the part of the section above referred to.] Therefore the Act directs for this purpose two kinds of purchase, one of land and the other of Bank Annuities.

Then I come to the 89th section: "Provided also, and be it further enacted, that where by reason of any disability or incapacity of the person or persons or corporation entitled to any lands."

Now, those words of course apply as a description of a particular kind of property which may be taken under the Act, and from which purchase-moneys may arise, that is, property belonging to persons under disability, and the purchase-money of which cannot be paid to such persons by reason of their disability, but must be paid into the Court of Chancery. Then, the purchase-money having got into the Court of Chancery, and being liable to be applied in "the purchase of other lands," the Act says, "it shall be lawful for the said Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable," to be paid by the commissioners or other persons taking lands under the Act. The Act says "*all* purchases"; why should I restrict the words? It also says, "from time to time"; why are not investments "purchases from time to time"? They are within the literal words of the Act. The meaning is that where the money has been laid out in the purchase of Bank Annuities it may be reinvested in land, and in order to do that the Bank Annuities must be sold out, and the proceeds can only be invested in land by "purchasing" it. That is the meaning of the Act, and it seems to me to be in accordance with good sense.

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M. R.
1877
In re
MERCERON.
Judgment.

It is said I am bound by authority. I have been referred to *In re Saunders' Estate* (1), before Lord Justice *James* when Vice-Chancellor, and it is said that that case obliges me to decide in favour of the Petitioner. The first observation I will make upon that case is that there are no reasons given for the decision. As a rule, Judges give reasons, though in many of the old cases the Judges gave no reasons; but where no reasons are given for a particular decision, it becomes extremely difficult for a Judge to follow it, because he does not know the principle on which the decision proceeded.

Now, this very section, the 89th, was read by the learned Lord Justice as empowering the Court to order so much of the expenses of all purchases made in pursuance of the Act as it should deem reasonable to be paid by the "other persons" therein mentioned, including a vestry, and thereupon he ordered the vestry to pay the costs of a petition for the payment out of Court of purchase-money paid in by them. The section, however, says nothing about the costs of payment out, and I am afraid the Lord Justice's sense of what ought to have been inserted in the Act led him to treat it as if it had been inserted. I cannot think he meant that as the Act rendered the vestry liable to pay the costs of purchases, therefore they were liable to pay the costs of a petition for payment out. There must have been some other reason; possibly the Lord Justice felt himself bound by a sense of abstract justice to take the view he did. But in *Ex parte Vicar and Churchwardens of St. Sepulchre's* (2) Lord *Westbury* decided this very point the other way, and *In re Strachan's Estate* (3), before Vice-Chancellor *Turner*, is another case which has a strong bearing upon it. Though I see Lord Justice *James* was counsel in the latter case, he does not seem to have remembered it when *In re Saunders' Estate* came before him, and neither of those two cases was cited to him. I cannot, therefore, consider *In re Saunders' Estate* as a binding decision.

It is said that *In re Harrison's Estate* (4) is an authority against payment of the costs of investment. It does not seem to me to be so. The words of the Act there were different, and altogether the case is not in point.

(1) Law Rep. 8 Eq. 681.
(2) 33 L. J. (Ch.) 372.
(3) 9 Hare, 185.
(4) Law Rep. 10 Eq. 532.

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M. R. 1877 *In re* MERCHERON. Judgment.

The tendency of the Courts now is to make an Act of this kind rational and just in its operation, and not to endeavour to read it so as to exclude the power of the Court of making public bodies who take lands belonging to other people pay the costs of the investment of the purchase-moneys arising from the lands so taken.

That being so, I am of opinion that the costs of this petition and of the proposed investment must be paid by the Board of Works.

Solicitors: *Fisher & Fisher; T. W. Ratcliff & Son.*

M. R. 1877 *May* 7.

WILKES *v.* SAUNION.

[1876 W. 294.]

Mortgagor and Mortgagee—Mortgage of Ship—Redemption Decree—"Just Allowances"—Expenses of enforcing Security—Taking and holding Possession, Advertising for Sale, and Insurance—Cons. Ord. XXIII., r. 16.

The mortgagees of a ship having seized it and advertised it for sale the mortgagors brought an action against them for redemption, and moved for an injunction to restrain the sale, when, upon the Defendants undertaking not to proceed with the sale, a decree was taken by consent in the action, directing an account of what was due on the mortgage for "principal and interest," and redemption on payment by the mortgagors of the amount certified:—

Held, upon summons by the Defendants, the mortgagees, that they were justified in seizing the ship, and that, in taking the account directed, they were entitled to be allowed expenses incurred by them in taking and holding possession of the ship, advertising it for sale, and effecting insurances, under the head of "just allowances."

Horlock v. *Smith* (1) considered (2).

Statement.

ADJOURNED SUMMONS.

The Plaintiff, who was the registered owner of a barque called the *Matilde*, obtained, through a firm of *Proust & Desseaux*, merchants, of *Havre*, a loan from one *Cummins* of £1000, such sum being secured by a mortgage of the barque to *Cummins*; and *Cummins* took, as collateral security, a bill of exchange, drawn

(1) 1 Coll. 298.

(2) See *Tipton Green Colliery Company* v. *Tipton Moat Colliery Company* (*post*, p. 192).

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by *Proust & Desseaux* on, and accepted by, the Defendants, a firm of merchants in *London*. The Defendants at the same time took, by way of indemnity, a cross bill from *Proust & Desseaux*, accepted by the latter.

It appeared that the Plaintiff was in reality a person of no means, being a working stevedore at *Havre*, and that he was merely the nominee of *Proust & Desseaux*, who were, in fact, the real owners of the ship.

The bill accepted by the Defendants was duly paid at maturity, but that accepted by *Proust & Desseaux* was dishonoured. The Defendants thereupon sued and obtained judgment against *Proust & Desseaux* in the French Court at *Bordeaux* for the amount of the dishonoured bill, and took a transfer of *Cummins'* mortgage.

Default was made in payment of interest under the mortgage, and the barque, arriving shortly afterwards at *Liverpool*, was seized by the Defendants under an order from the Admiralty Division, and advertised by them for sale.

The Plaintiff then brought an action, on the 3rd of August, 1876, against the Defendants for redemption of the mortgage, and on the 25th of August moved for an injunction to restrain the sale, when, upon the Defendants undertaking not to proceed with the sale, and upon a sum of money being brought into Court by the Plaintiff in part payment of his mortgage debt, a decree was made in the action, by consent, directing "an account of what, if anything, was due from the Plaintiff to the Defendants for principal and interest" under the mortgage; and delivery up of the mortgage security upon the Plaintiff paying "what should be certified by the Chief Clerk to be the total amount of principal and interest, within a month from the date of the certificate": the question of the costs of the action being reserved. No statement of claim or defence was delivered in the action.

The Chief Clerk, by his certificate, found that the sum of £72 17*s.* 5*d.* was due to the Defendants for principal and interest under the mortgage, but disallowed a sum of £50 10*s.* claimed by them for expenses incurred in taking and holding possession of the ship, advertising it for sale, and effecting insurances.

A summons was then taken out by the Defendants for the purpose of taking his Lordship's opinion upon the point (amongst

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others which it is unnecessary to notice) whether their claim of £50 10s. in respect of the items above mentioned should be allowed.

Chitty, Q.C., and *C. H. Turner*, for the summons:—

These items represent expenses necessarily incurred for the purpose of enforcing and giving effect to our security, and we therefore submit we are entitled to have them allowed under the head of "just allowances," pursuant to Cons. Ord. XXIII., r. 16 (22nd Aug., 1859), *Morgan* (1), which is still in force, and which provides that "in taking any account directed by any decree or order, all just allowances shall be made, without any direction for that purpose in such decree or order."

Davey, Q.C., and *E. C. Willis*, for the Plaintiff:—

The decree having been taken by consent, and the only account directed being for principal and interest, the Defendant must be held to have waived these items. At all events, to entitle him to these allowances, he should have made out a case for them by his pleadings, as in *Merriman* v. *Bonney* (2), where Vice-Chancellor *Kindersley* held that to entitle a mortgagee to an inquiry as to "costs, charges, and expenses properly incurred in relation to the mortgage security," he must make out a case by his bill. In *Seton* on Decrees (3), *Horlock* v. *Smith* (4) is cited as an authority that a mortgagee could not be allowed the costs of a successful ejectment under the head of "just allowances" where the decree was silent as to such costs.

[JESSEL, M.R.:—That case was decided in 1844, before the order under which "just allowances" are now imported into every decree directing accounts. The case is not quite correctly stated in *Seton*, for the decision clearly intimates that if "just allowances" had been mentioned in the decree the costs of the ejectment by the mortgagee, that is, the costs incurred by her in enforcing and giving effect to her security, would have been allowed. Mr. *Wigram*, in his argument, states the law to be that in an account between mortgagor and mortgagee, the mortgagee

(1) 5th Ed. p. 473.
(2) 12 W. R. 461.
(3) 3rd Ed. p. 381.
(4) 1 Coll. 298.

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is entitled to all costs incurred in fairly and reasonably maintaining his title at law; and in support of that proposition he cites *Dryden* v. *Frost* (1) and *Ellison* v. *Wright* (2). To that statement of the law Vice-Chancellor *Knight Bruce* in reality assents, but under the particular circumstances of the case he declined to give the mortgagee the costs.]

This is really a summons to alter the decree, and in *Barron* v. *Lancefield* (3), where a foreclosure decree had been made and the accounts taken, it was held that the mortgagee could not, on petition, obtain an order altering the decree so as to give him costs subsequently incurred in relation to his security.

[JESSEL, M.R., in the course of the argument referred to *Dan.* Ch. Pr. (4), and to the following cases, in which "just allowances" were held to include—executors' charges and expenses: *Fearns* v. *Young* (5); payments by them in discharge of legacies: *Nightingale* v. *Lawson* (6); deduction for dower out of rents receivable by a widow-trustee: *Graham* v. *Graham* (7); expenses of managing and carrying on a partnership business: *Brown* v. *De Tastet* (8); *Cook* v. *Collingridge* (9); but not to include setting off taxed costs by a solicitor accountable for rents received by him as steward or agent: *Jolliffe* v. *Hector* (10).]

Judgment.

JESSEL, M.R.:—

The real question to be decided is whether or not the Defendants are entitled to the costs of seizing and holding a ship of which they are mortgagees; and that depends upon the preliminary question, whether they were, as such mortgagees, warranted in taking possession. Now, upon the latter question, the rule is well settled that, after default in payment of principal and interest, mortgagees are justified in taking possession of the mortgaged property. In the present instance the Plaintiff was clearly in default, and accordingly when the ship came within the jurisdiction the Defendants, the mortgagees, seized it under an order of

(1) 3 My. & Cr. 670.
(2) 3 Russ. 458.
(3) 17 Beav. 208.
(4) 5th Ed. pp. 1132–6.
(5) 10 Ves. 184.
(6) 1 Cox, 23.
(7) 1 Ves. Sen. 262.
(8) Jac. 284, 299.
(9) Jac. 607, 621.
(10) 12 Sim. 398.

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M. R. 1877 WILKES v. SAUNION. Judgment.

the Admiralty Division, which was the right way of taking possession. A balance is still due to the Defendants on the mortgage, and, as far as I can see, if they had not seized the vessel they would not have been paid. That was their only possible security, and the only way of getting back their money.

I am therefore of opinion that the Defendants were entitled to seize the ship; and as the costs of seizure and the other subsequent costs claimed by them were necessarily incurred in enforcing their security so as to enable them to reap the benefit of it, I think I am quite justified, having regard to the authorities, in allowing, as I do, this claim under the head of "just allowances." That being so, the Defendants are also entitled to have their costs of this summons added to their security.

Solicitors: *S. Chapman; Keene & Marsland.*

M. R. 1877 Dec. 7.

TIPTON GREEN COLLIERY COMPANY *v.* TIPTON MOAT COLLIERY COMPANY.

[1876 T. 701.]

Mortgagor and Mortgagee—Redemption Decree—Mines—Mortgagee in Possession —"Just Allowances"—"Necessary Repairs"—"Permanent Improvements" —Cons. Ord. XXIII., r. 16.

In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances"; but, to entitle him to "permanent improvements," or "substantial repairs," he must make out a case for them at the trial.

Statement.

THE Plaintiffs in this action were the purchasers and the Defendants the vendors of certain leasehold coal mines called the *Moat Colliery*, in *Staffordshire*, the purchase-money being payable by instalments under a deed of arrangement. The Plaintiffs having made default in payment of one of the instalments, the Defendants took possession of the colliery by way of enforcing their lien for the unpaid portion of the purchase-money, and proceeded to work the colliery on their own account.

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M. R.
1877
TIPTON GREEN COLLIERY COMPANY v. TIPTON MOAT COLLIERY COMPANY.

The Plaintiffs then brought this action, claiming, amongst other things, that they should be allowed to redeem the colliery on payment of the unpaid balance of purchase-money and interest thereon, as though the Defendants were mortgagees in possession under the powers of an ordinary mortgage deed, and that for that purpose all necessary accounts should be taken.

In their statement of defence the Defendants submitted to account for profits made by them in working the colliery.

Statement.

The action came on for trial on the 6th of August, 1876, when his Lordship made the "usual redemption decree" as against mortgagees in possession.

According to the minutes of decree as given out by the Registrar, the only accounts directed were, first, an account of what was due to the Defendants for unpaid purchase-money, interest, and the costs of the action; and, secondly, an account of rents and profits received by the Defendants; and it was ordered that upon the Plaintiffs paying to the Defendants what should be found due to them for unpaid purchase-money, interest, and costs, after deducting therefrom the amount of rents and profits received by the Defendants, the Defendants should re-surrender the colliery to the Plaintiffs, or that, in default, the action should stand dismissed.

The Defendants now moved that the minutes as so given out should be altered or varied by including (amongst other things) an account of what was due to the Defendants for moneys expended by them "in necessary repairs or permanent improvements, or in the preservation" of the colliery.

No claim was made in the statement of defence for expenses of repairs or permanent improvements, nor was it proved at the trial that the Defendants had incurred any such expenditure.

Argument.

Chitty, Q.C., and *Russell Roberts*, for the motion:—

We are clearly entitled as mortgagees to "just allowances," even without any express direction in the decree: Cons. Ord. XXIII., r. 16. The question is whether "necessary repairs" and "permanent improvements" can be included under that head. As to the former, we submit that, as mortgagees in possession, we ought to be allowed expenses incurred in preserving the property

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and so protecting our security: *Wilkes* v. *Saunion* (1). As to "permanent improvements," we admit that they cannot be allowed unless they are claimed and proved by the mortgagee at the trial, and specially mentioned in the decree: *Seton* on Decrees (2). With regard to ordinary repairs, it seems usual to mention them in the decree: *Powell* v. *Trotter* (3); *Seton* on Decrees (4), where the form is "necessary repairs and lasting improvements." "Just allowances" should be liberally construed: *Blackford* v. *Davis* (5).

Davey, Q.C., and *Phipson Beale*, for the Plaintiffs:—

We submit that the minutes should remain unaltered. Whatever the Defendants are entitled to they will get as a matter of course under the head of "just allowances." Permanent improvements they cannot get at all, as they now, in fact, admit, since they have made out no case for them by their defence.

Judgment.

JESSEL, M.R.:—

As I understand, the mortgagee in a redemption suit never has permanent improvements allowed unless he proves at the trial that there are some, and gets them inserted in the decree. The law is so stated in *Fisher* on Mortgages (6), where it is said that "to entitle a mortgagee to an inquiry as to money laid out in lasting improvements, he need not prove at the hearing what precise sums were so laid out; yet no inquiry will be granted on his bare allegation, without evidence that he has laid out money for the purpose." Mr. *Fisher* also says (7), and says correctly, that "the words 'all just allowances' in a decree, cover all payments to which the mortgagee is entitled under the terms of his security," except lasting improvements; and I think that necessary repairs are included in the words. As an authority for that, I will refer to Lord *Langdale's* judgment in *Sandon* v. *Hooper* (8), where he says: "The next question is, whether the Plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mort-

(1) *Ante*, p. 188.
(2) 3rd Ed. p. 383.
(3) 1 Dr. & Sm. 388.
(4) 3rd Ed. pp. 367, 396.
(5) Law Rep. 4 Ch. 304.
(6) 3rd Ed. p. 952.
(7) Ibid.
(8) 6 Beav. 246.

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gaged property, several cases have occurred at different times, shewing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for."

I am, therefore, clearly of opinion that under "just allowances," which are supposed to be in the decree, you will get necessary repairs. If you want anything else, such as improvements, or what are sometimes called "substantial repairs," you must ask for them; but then you must not only allege, but also prove them.

Therefore "permanent improvements" the Defendants will not get, but "necessary repairs" they will get, under "just allowances."

The first account directed by the decree may be "of what is due to the Defendants for unpaid purchase-money and interest, or otherwise," which will carry everything; then it will go on in the usual way to provide for the costs of the action.

The decree will be dated as from to-day, and I shall give no costs of this motion to either party.

Solicitors for Plaintiffs: *Whateley, Milward, & Whitehead,* agents for *Whateley & Co., Birmingham.*

Solicitors for Defendants: *Tucker & Lake,* agents for *Wragge, Evans, & Co., Birmingham.*

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V.-C. M.
1877
Dec. 21.

COX *v.* WATSON.

[1875 C. 144.]

Practice—Foreclosure absolute—Power of Attorney.

Under a decree for foreclosure an agent of the mortgagees attended at the place appointed for payment of the money, and during the whole of the appointed time, but without any power of attorney to receive the money. No one appeared on behalf of the mortgagors:—

Held, that the foreclosure ought to be made absolute.

Statement. UNDER a foreclosure decree the place and time appointed for payment of the money found due were the *Chapel of the Rolls Yard* between twelve and one o'clock on the 18th of December, 1877. A clerk of the Plaintiff's solicitor attended on behalf of the Plaintiffs on the 18th of December from twelve till one at the *Rolls Chapel*, but had no power of attorney to receive the money. No person appeared on behalf of the Defendants.

Argument. *Higgins*, Q.C., and *Cadman Jones*, applied to make the foreclosure absolute. They referred to *Gurney* v. *Jackson* (1); *Anon.* (2); and *Lechmere* v. *Clamp* (3).

Judgment. MALINS, V.C., held that as the mortgagors had not appeared they were in no way prejudiced by the omission of the Plaintiff's agent to bring a power of attorney. The usual order for making the foreclosure absolute was therefore made.

Solicitors: *Goldring & Jukes.*

(1) 1 Sm. & G. app. xxvi. (2) 1 Coll. 273. (3) 31 Beav. 578.

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In re WOLVERTON MORTGAGED ESTATES.

V.-C. M.
1877
Dec. 7.

Will—Ambiguity—Parol Evidence.

A testator left a legacy to the children of his daughter by any husband other than Mr. *Thomas Fisher*, of *Bridge Street, Bath.*

There was a Mr. *Thomas Fisher*, of *Bridge Street, Bath*, who was a married man.

There was also a *Henry Tom Fisher*, son of the above, who sometimes lived with his father:—

Held, that although Mr. *Thomas Fisher* answered the description, and his son's name was not *Thomas* but *Tom*, parol evidence of the above circumstances might be admitted to shew which was intended.

Statement.

THOMAS PAWSEY, by his will, dated the 15th of August, 1867, bequeathed a sum of £600 to his executors upon trust to invest it, and to pay the income to his daughter *Rosa Pawsey* for her life, and on her death to hold the fund in trust for the children of *Rosa Pawsey* by any husband with whom she might intermarry "other than and except Mr. *Thomas Fisher*, of *Bridge Street, Bath*," and subject thereto for the testator's son *Edwin Pawsey* absolutely. At the date of the will there lived in *Bridge Street, Bath*, a Mr. *Thomas Fisher*, but he was a married man with a wife and family. The son of *Thomas Fisher*, whose name was *Henry Tom Fisher*, had paid his addresses to the testator's daughter; he was a commercial traveller, and was often at his father's house. After the testator's death, which happened in 1869, *Rosa Pawsey* married *Henry Tom Fisher*; the question in this petition was whether her child was entitled to the £600.

The fund having been paid into Court under the *Trustees Relief Act*, a petition was presented by the executors of the will for payment of it out to them, and the petition was opposed on behalf of the child of *Rosa Fisher*, who claimed to be entitled to it.

Argument.

Glasse, Q.C., and *Campbell*, for the Petitioners:—

It is absurd to suppose that the testator meant to prevent his daughter marrying Mr. *Thomas Fisher*, a married man. If parol evidence can be admitted, we can shew that *Henry Tom Fisher*, his son, was paying his addresses to the daughter, and that the

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In re WOLVERTON MORTGAGED ESTATES.

testator was opposed to his marrying her, and that he must have been the person intended.

That parol evidence can be admitted in such a case is clear from *Charter* v. *Charter* (1). *Roper* on Legacies (2) laid down the rule clearly.

Argument.

MALINS, V.C., referred to *Gillett* v. *Gane* (3), where the name prevailed over the description.

J. Pearson, Q.C., and *Phear*, for the infant child of *Rosa Fisher*:—

As there was in existence a Mr. *Thomas Fisher* who precisely corresponded with the description in the will, no parol evidence can be admitted to shew that the person so named and described in the will was not the person really intended. This would be to create an ambiguity, when on the face of the instrument there is none: *Bernasconi* v. *Atkinson* (4).

Judgment.

MALINS, V.C.:—

The question here raised is singular, and not absolutely free from doubt. In all these cases some parol evidence is almost always more or less admissible in order to shew the position of affairs, and to put the Court in the position of the testator at the time of his death. In *Charter* v. *Charter* (5) Lord *Cairns* said: "In all cases of testamentary dispositions the Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied." The executors could not believe that Mr. *Thomas Fisher*, a married man, was really intended by the testator. What, then, could they do? They inquired further, and found a son of his, *Henry Tom Fisher*, who by the name of "*Tom Fisher*" was known to the testator. "*Thomas*" and "*Tom*" are generally forms of the same name, and though *Tom* was here the son's Christian

(1) Law Rep. 7 H. L. 364.
(2) Ed. 1847, p. 148.
(3) Law Rep. 10 Eq. 29.
(4) 10 Hare, 345.
(5) Law Rep. 7 H. L. 377.

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name, the names of *Thomas* and of *Tom* being in reality only forms of the same name, it is necessary to adduce parol evidence of the state of circumstances in which the testator stood when he made his will to ascertain which of the two *Fishers* he meant; and to assume that he meant the father, *Thomas Fisher*, a man then of fifty years of age, with a wife and family, is ridiculous.

Tom Fisher had been paying attentions to the testator's daughter, and he strongly objected to her marriage with him. There, then, may be found a clue to the person intended by the testator when he spoke of Mr. *Thomas Fisher*. Then, again, the two *Fishers* had the same home, and it was quite competent for the executors to adduce parol evidence to prove which of those two persons was really within the testator's contemplation.

There appear to be practically two *Thomas Fishers* living in *Bridge Street*, though one was christened *Tom* and the other *Thomas*. I must take it as proved that the testator meant *Tom Fisher*. The case comes within the reasonable rule that the Court must find out who are the persons answering an ambiguous description. No doubt where one person accurately fulfils the description, and no one else does, you cannot admit parol evidence to shew that such person was not intended; but here there are two persons who substantially, though not with perfect accuracy, come within the description of *Thomas Fisher* of *Bridge Street*.

A question very similar to the present was decided in *Charter* v. *Charter*, and in that case the conclusion was arrived at because, taking the whole will together, it was clear that the intention was to give the property to the son who resided with his mother, and therefore, though a son whose name was *Forster* was named, and there was a son living 100 miles away whose name was *William Forster*, the Court held that another son whose name was *Charles* was intended. Under the very peculiar circumstances of this case, as there were two persons, as I consider, within the description in the will, to one of whom it was impossible that the testator's words could have applied, I think I shall not be going out of the rule if I admit the parol evidence, and I must hold that the infant Respondents are not, and the Petitioners are, entitled to the legacy.

Solicitors: *Clarke, Woodcock, & Ryland; Prior, Bigg, Church, & Adams.*

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V.-C. M.

1877

Dec. 7.

In re MELLOR'S POLICY TRUSTS.

Married Women's Property Act (33 & 34 *Vict.* c. 93), s. 10—*Policy of Assurance—Distribution on Death of Husband—Form of Order.*

A husband effected a policy for the benefit of his wife and children under the *Married Women's Property Act.*

The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate.

Statement.

IN this case (1) an application was now made that the moneys received under the policy which had been effected by *William Mellor*, deceased, "for the benefit of his wife and children," might be applied according to the provisions of the *Statute of Distributions*, as if *William Mellor* had died intestate.

The application was supported by an affidavit shewing that the husband had died insolvent, and that the income of the money to be received under the policy would be inadequate for the maintenance of the wife and children.

Oswald, for the petition, referred to *Sanderson* v. *Sanderson*, before his Lordship, June 8, 1877.

Argument.

Freeling (*amicus curiæ*) said that Lord *Romilly*, M.R., had frequently inserted in settlements made by the Court on married women and their children a provision that the trustees might, with the consent of the Court, raise a sum for the advancement of the married woman.

Judgment.

MALINS, V.C., referred to the 10th section of the *Married Women's Property Act*, 1870, and held that he could interpret the provision in that section, which requires in such cases that the money is to be held "in trust for the wife for her separate use," as meaning that it was to be held for her separate use as against a husband so long as the woman was married, and that it did not mean that a woman formerly married, but whose husband was

(1) 6 Ch. D. 627.

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dead, could not take a part of the capital with the sanction of the Court.

V.-C. M. 1877 *In re* MELLOR'S POLICY TRUSTS.

As the applicant was a widow, and proved to be in poor circumstances, he should hold that the money might be distributed as in the case of an intestacy.

Solicitors: *Layton & Jaques.*

In re WHITE AND HINDLE'S CONTRACT.

V.-C. M. 1877 *Dec.* 8.

Rule in Shelley's Case—Deed and Will—Legal and Equitable Estate.

The principles governing the application of the rule in *Shelley's Case* are the same in the case of wills as in the case of deeds.

Remarks on *Cooper* v. *Kynock* (1) and *Crofts* v. *Middleton* (2).

ADJOURNED SUMMONS.

Statement.

The question raised was whether the rule in *Shelley's Case* applied to the following limitations in a will so as to give *Elizabeth Ann White* an estate in fee.

The property devised was subject to a mortgage, and the devise was therefore of an equitable estate.

The material limitations were as follows: "To the use of trustees, their executors and administrators, during the life of *E. A. White*, upon trust for *E. A. White* for her separate use, and after her decease, in case *W. W. White* should survive her, to the use of *W. W. White* for life, and after the decease of *E. A. White* and *W. W. White*, to the use of *Rose Edmunds* if she should be living at the decease of her mother, and to her heirs and assigns for ever, and in case *Rose Edmunds* should die in the lifetime of her mother, to the use of such persons as *E. A. White* should by will appoint, and in default of appointment, to the use of the heirs of *E. A. White* for ever."

It was contended on the part of the vendors, under a contract for sale of the property, that *E. A. White* took an estate in fee under the above limitations (subject to the intermediate estates), and on the part of the purchasers that she did not take such

(1) Law Rep. 7 Ch. 398. (2) 2 K. & J. 194.

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V.-C. M. 1877 *In re* WHITE AND HINDLE'S CONTRACT.

estate on the ground, 1, that the limitation to her heirs was not by way of remainder, but of an executory devise or shifting use; and, 2, that the limitation to *E. A. White* for life being equitable in form, and that to her heirs being legal in form, the rule in *Shelley's Case* did not apply.

Argument.

J. Pearson, Q.C., and *Macnaghten*, for the purchasers:—

This is the case of a will and not a deed, and therefore the intention of the testator may be looked at. If that be so, it is clear in this case that the intention was to give *E. A. White* a trust estate only for life, with an ultimate contingent interest in her heirs. In the ultimate limitation only "heirs" of *E. A. White* are named, though the gift to *Rosa Edmunds* is to her, her heirs and assigns. The intention being thus made out, the equitable gift for life ought not in a will to coalesce with the remainder to the heirs, which is legal in terms, though by the accident of the outstanding mortgage all the limitations have become equitable.

In *Cooper* v. *Kynock* (1), which was a similar case on a deed, it was said that the construction might have been otherwise on a will.

Crofts v. *Middleton* (2) was a case of a will, and the life estate and a contingent remainder to heirs was held not to coalesce.

[They also referred to *Fearne* on Contingent Remainders (3); *Plunkett* v. *Holmes* (4).] And the rule in *Shelley's Case* does not apply where the limitation to the heirs is by way of an executory interest: *Theobald* on Wills (5).

Higgins, Q.C., and *Whitehorne*, for the vendor, were not heard.

Judgment.

MALINS, V.C.:—

In this case the rule in *Shelley's Case* applies, as all the limitations are equitable. I am not aware that there is any difference whatever in the application of the rule in *Shelley's Case* to a deed and to a will. It is stated in the report of *Cooper* v. *Kynock* that the construction might have been otherwise in a will, but this

(1) Law Rep. 7 Ch. 398.
(2) 2 K. & J. 194; 8 D. M. & G. 192.
(3) Pages 276, 341.
(4) 1 Lev. 11.
(5) Page 218.

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statement has reference to the estate in fee taken by the trustees, and not to the application of the rule in *Shelley's Case*. As to *Crofts* v. *Middleton* (1), I am unable to agree with the judgment of Vice-Chancellor *Wood*, that there was not an immediate fee simple given in that case, and this point was not decided on the appeal. As regards the argument that the rule in *Shelley's Case* does not apply where the gift to heirs is by way of an executory or conditional limitation, I should be slow to admit such a doctrine if the question came before me; but in the present case I have no doubt that the limitations are contingent remainders and not executory or conditional limitations. The summons must therefore be decided in favour of the vendor.

Solicitors: *Cookson, Wainwright, & Pennington; Lewis, Munns, & Longden.*

(1) 2 K. & J. 194; 8 D. M. & G. 192.

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V.-C. B.
1877
Nov. 9.

In re COX.
COX *v.* DAVIE.

[1876 C. 80.]

Will—Construction—Charitable Bequest—Mortmain.

A bequest to the corporation of *T.* of a sum of £3000 Consols, of which £1000 was to be expended "in the erection of a dispensary, which is so urgently needed there," and the remaining £2000 to be invested as "an endowment fund for the said dispensary":—

Held, void under 9 Geo. 2, c. 36, although the corporation held land in mortmain at *T.* which was available for the purposes of the bequest.

Statement.

WILLIAM SANDS COX, by his will, dated the 3rd of February, 1875, after making numerous charitable bequests (including funds for the building of an hospital and several dispensaries), bequeathed "to the mayor and town councillors for the time being of *Tamworth* the sum of £3000 £3 per Cent. Consolidated Annuities;" and directed that the sum of £1000 Consols, part of the said sum of £3000 Consols, should be expended by them "in the erection of a plain, simple building as a dispensary, which is so urgently needed there;" and that the sum of £2000 Consols, the residue of the said sum of £3000 Consols, should be held by them "as an endowment fund for the said dispensary," and invested in such names as they should think fit, and the dividends thereof should from time to time be applied towards the support of the said dispensary.

The will contained a direction that no lands should be purchased or buildings erected out of the aforesaid sums given for the purpose of endowing the said hospital and dispensaries, or any or either of them.

The testator died in December, 1875, and this action was instituted in February, 1876, for the administration of his estate. The cause now came on to be heard on further consideration, a question being raised whether the above bequest to the Corporation of *Tamworth* was within the statute 9 Geo. 2, c. 36.

There was evidence that the corporation had power under their charters to acquire and hold land in mortmain for the erection of

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hospitals, and had land at *Tamworth* available for the purposes of the bequest.

Russell Roberts, for the Plaintiff.

Sir *H. Jackson*, Q.C., and *Rowden*, for the next of kin, who were desirous that the testator's intentions should be carried into effect, if possible, did not oppose.

Bevir, Q.C., and *Dickens*, for another charity, and also for a residuary legatee, did not oppose.

E. W. Byrne (*Hemming*, Q.C., with him), for the Corporation of *Tamworth*:—

No doubt the rule of construction is that a direction to build includes a direction to purchase land for the purpose of building, but the rule does not of necessity apply if the testator distinctly points to some land already in mortmain, or if the land can be obtained otherwise than by purchase through the gift of the testator: *Philpott* v. *St. George's Hospital* (1); *Attorney-General* v. *Davies* (2); *Attorney-General* v. *Whitchurch* (3); *Giblett* v. *Hobson* (4).

The testator knew all about the Corporation of *Tamworth*, and the inference is that he also knew the corporation held land in mortmain upon which they could build a dispensary. The Court will always construe a charitable bequest favourably if the legatee has land in mortmain already in possession upon which the gift can operate: *Cresswell* v. *Cresswell* (5). In *Booth* v. *Carter* (6) a bequest to the trustees of a particular chapel in *C.*, to be applied towards the erection of a new chapel in *C.*, was upheld, the trustees having land at *C.* in mortmain on which a new chapel could be built; and in *Sewell* v. *Crewe-Read* (7) a legacy to be applied in building a parsonage house was held good, there being glebe land belonging to the living upon which a house could be built. In this gift the words "which are so urgently needed there" suffi-

(1) 6 H. L. C. 338.
(2) 9 Ves. 535.
(3) 3 Ves. 141.
(4) 3 My. & K. 517.
(5) Law Rep. 6 Eq. 69.
(6) Ibid. 3 Eq. 757.
(7) Law Rep. 3 Eq. 60.

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V.-C. B. 1877 *In re* Cox. Cox v. Davie. Argument.

ciently point out, I submit, the land upon which the building was to be erected, and that the testator clearly intended the £1000 to be laid out by the corporation in building simply upon some of their land at *Tamworth* which was available for the purpose. At any rate, if the building fund fails, the endowment fund does not necessarily fail with it: *University of London* v. *Yarrow* (1); *Sinnett* v. *Herbert* (2).

Kay, Q.C., and *Woodroffe*, for the executors, and also for some residuary legatees not before the Court:—

The direction in the will that the moneys given for endowment should not be laid out in purchasing land or erecting buildings affords a strong presumption that the testator did intend land to be purchased as a site for the dispensary. Further, the rule of construction, as laid down by Vice-Chancellor *Wickens* in *Pratt* v. *Harvey* (3), is settled law, that in order to validate a gift of this kind you must find in the will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given to the acquisition of land: *Attorney-General* v. *Tyndall* (4); *Attorney-General* v. *Davies* (5); *Giblett* v. *Hobson* (6); *Dunn* v. *Bownas* (7); *Smith* v. *Oliver* (8); *Tatham* v. *Drummond* (9); *Pritchard* v. *Arbouin* (10); *Mather* v. *Scott* (11). In *Philpott* v. *St. George's Hospital* (12) there was an express direction that the money should not be laid out in the purchase of land. Then *Booth* v. *Carter* (13) was not followed by Vice-Chancellor *Malins* in *In re Watmough's Trusts* (14). In *Sewell* v. *Crewe-Read* (15) evidence was admitted to prove that the testator pointed to a particular piece of land; and in *Cresswell* v. *Cresswell* (16) Vice-Chancellor *Giffard* held that there was a sufficient indication of the land on which the building was to be erected. None of those circum-

(1) 1 De G. & J. 72.
(2) Law Rep. 7 Ch. 232.
(3) Ibid. 12 Eq. 544.
(4) Amb. 614.
(5) 9 Ves. 535.
(6) 3 My. & K. 517.
(7) 1 K. & J. 596.
(8) 11 Beav. 481.
(9) 4 D. J. & S. 484.
(10) 3 Russ. 456.
(11) 2 Keen, 172.
(12) 6 H. L. C. 338.
(13) Law Rep. 3 Eq. 757.
(14) Ibid. 8 Eq. 272.
(15) Ibid. 3 Eq. 60.
(16) Ibid. 6 Eq. 69.

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stances exist in this case. The gift therefore fails, and as the primary object fails, the secondary object, the endowment, also fails: *Smith* v. *Oliver* (1); *Dunn* v. *Bownas* (2).

Rigby, for other charities, adopted Mr. *Kay's* argument.

E. W. Byrne, in reply.

Judgment.

BACON, V.C.:—

No doubt the temptation is very strong indeed to uphold this charitable bequest, but I am not at liberty to yield to any such temptation as may be presented to me. I have only to administer the law as I find it. The *Statute of Mortmain* (9 Geo. 2, c. 36) has been frequently under discussion and commented upon in various Courts, and from the earliest time when any decision has been pronounced upon it, it seems to have been established that that rule which is mentioned in *Philpott* v. *St. George's Hospital* (3), and more distinctly enunciated in the case of *Pratt* v. *Harvey* (4) before Vice-Chancellor *Wickens*, has been the rule of all the decisions. To take it out of the *Statute of Mortmain* the gift must be to build upon land which is indicated, or there must be a prohibition as to laying out the money devoted to that purpose to any other. That is the principle of all the decisions. The two cases before the Master of the Rolls do not impeach that rule in the slightest degree. In *Booth* v. *Carter* (5) the new chapel seems to have been held to be a mere substitution for an old one. In the other case, *Sewell* v. *Crewe-Read* (6), the Master of the Rolls, as a matter of construction, held that the letter of the testator enabled the Court to come to the conclusion pronounced in the judgment, although in the former case the learned Judge said it was carrying it a shade further than was ever done before. The case of *Philpott* v. *St. George's Hospital* is one of the most important on this subject—important in itself, and still more important because by very patient and learned Judges all the authorities then extant were considered and commented upon, and in that case the rule is

(1) 11 Beav. 481.
(2) 1 K. & J. 596.
(3) 6 H. L. C. 338.
(4) Law Rep. 12 Eq. 544.
(5) Ibid. 3 Eq. 757.
(6) Ibid. 60.

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V.-C. B. 1877 In re Cox. Cox v. DAVIE. Judgment.

stated in the most distinct manner that can be conceived, namely, either the land must be so indicated as that you can say that it is not within the *Statute of Mortmain*, or the direction must be that you must not lay out the amount of the legacy upon any other land than that which is already in mortmain. The case which has most occupied my attention is that of *Cresswell* v. *Cresswell* (1), which comes nearest to the present case, and if I could follow it so as to prevent the application of the rule, I do not hesitate to say I should be very glad to do so; but when that is examined, that must also be treated as a question of construction. The learned Judge, aware of the rule, not intending to depart from it, knowing all the authorities upon the subject, found out by the expressions used in connection with the church or other surrounding circumstances, that he was able to say the land had been indicated.

Now the words in this will point to purchase. It is not enough to say that the town council have already lands in mortmain, because the direction in the will is that, out of the legacy of £3000, £1000 is to be expended by them in erecting a building "as a dispensary, which is so urgently needed there." It has been held that a direction to erect a building contains in it also a direction or authority to purchase, and even if that were not so plain as it is upon the authorities, it is very plain upon this will, because in that passage to which my attention has been drawn the testator seems to say that he meant land to be purchased. He says: "I direct that no lands shall be purchased or buildings erected out of the aforesaid sums given for the purpose of endowing the said hospital and dispensaries." The authority, therefore, is to lay out in the purchase of land all that was not dedicated to the endowment of which he speaks. In the face of the authorities I have no alternative but to see that those rules laid down as applicable to such like bequests must be at all times adhered to, and those rules have the effect of invalidating this legacy.

Then with regard to the question as to the £1000 being for erecting the building, and the £2000 for endowing it, that has been abundantly covered by decision. The gift being for £3000, divided into two sums of £1000 and £2000 for the purposes there mentioned, I cannot uphold the endowment fund, as it is called,

(1) Law Rep. 6 Eq. 69.

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even although the municipal officers of *Tamworth* may have erected a dispensary; but I cannot hesitate to say I am very sorry that I am obliged to decide by force of the authorities against what is the plain intention of this testator.

Solicitors for Plaintiff: *Kennedy, Hughes, & Kennedy.*

Solicitors for Corporation of *Tamworth*: *F. J. & G. J. Braikenridge.*

Solicitors for other parties: *J. G. Brownlow; Peacock & Goddard.*

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V.-C. H.

1877

Nov. 14, 15.

YEATMAN *v.* YEATMAN.

[1876 Y. 7.]

Administration—Legal Personal Representative—Refusal to sue—Action by Residuary Legatee.

Mere refusal by a legal personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the legal personal representative and the alleged debtor to the estate.

Bowsher v. *Watkins* (1) and *Hilliard* v. *Eiffe* (2) commented on.

The circumstances which would suffice to induce the Court to answer in the affirmative an inquiry whether proceedings ought to be instituted, will in general suffice to entitle a person beneficially interested to sue in his own name.

Statement.

THE late Mr. *F. F. Yeatman*, who carried on, in partnership with his son, *Christopher Yeatman*, the business of a wine merchant at *Boston*, in the county of *Lincoln*, by his will, dated the 3rd of March, 1863, after appointing his sons, the Defendants, *F. F. Yeatman* and *Christopher Yeatman*, executors of his will, and bequeathing to his wife, *Caroline Yeatman*, the lease of his house, vaults, and premises for her life, she permitting their son *Christopher* to occupy the business premises, directed his said son to carry on the business, and to divide the profits thereof equally between himself and the said *Caroline Yeatman* during her life (making a yearly statement of such profits), and gave him liberty to retain and employ in the business the capital employed therein, save such part thereof as might be required for the payment of the debts and legacies thereinafter directed to be paid. The testator also directed that interest on the capital so employed after the rate of 3 per cent. per annum should be paid to his wife before any division of profits should be made, and provided that on the death of his wife the business should be carried on by, and the profits divided between, his sons *Christopher* and *F. F.*, unless the latter son failed to comply with certain conditions, in which case he was to receive a fixed sum; and after giving pecuniary legacies, the testator directed his trustees to sell his residuary personal

(1) 1 Russ. & My. 277. (2) Law Rep. 7 H. L. 39.

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estate, and apply the proceeds for the purposes aforesaid, directing that any deficiency should be raised and paid by his son *Christopher* out of the capital allowed to remain in the business.

The testator died in November, 1866, and after his death the business was carried on by *Christopher Yeatman.*

Caroline Yeatman, by her will, dated in May, 1873, after giving specific legacies, devised and bequeathed her residuary estate and effects equally between her sons, the Defendants *F. F.* and *H. J. Yeatman,* and her daughter-in-law, the Plaintiff *Charlotte Murray Houghton Yeatman,* subject to a proviso that if after her decease her son *F. F. Yeatman* should elect to enter into partnership with his brother *Christopher,* her residuary estate should go equally between *H. J. Yeatman* and the Plaintiff, and she appointed *F. F.* and *H. J. Yeatman* her executors.

Caroline Yeatman died on the 31st of March, 1875, and on her death *F. F. Yeatman* did not elect to enter into partnership, but accepted the sum fixed by his father's will.

In March, 1876, the Plaintiff issued her writ in this action against *Christopher Yeatman* and *F. F.* and *H. J. Yeatman,* and in her statement of claim she averred that although *Christopher Yeatman* from time to time paid to *Caroline Yeatman* certain sums on account of the interest on the capital, which he was by the will of the testator directed to pay to her, and of her share in the profits of the business, no proper yearly statement or balance-sheet had ever been made out by him, nor had any settled account ever been come to between him and *Caroline Yeatman;* and that, after *Caroline Yeatman's* death, the Plaintiff being dissatisfied with the accounts rendered by *Christopher Yeatman* to *Caroline Yeatman's* executors, required him to furnish a proper account of the capital of the testator employed in, and a profit and loss account of the business; and that the account rendered in consequence of this application was inaccurate. The Plaintiff then made specific averments to shew that such accounts were inaccurate, and that if they were properly taken there would be a considerable balance due from the Defendant *Christopher Yeatman* to the estate of *Caroline Yeatman,* and she alleged that upon *Christopher's* refusal to correct his accounts she applied to the Defendants *F. F.* and *H. J. Yeatman,* as the executors of *Caroline Yeat-*

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V.-C. H. 1877 YEATMAN v. YEATMAN. Statement.

man's will, to take proper proceedings to recover the personal estate of *Caroline Yeatman* from *Christopher Yeatman*, offering to indemnify them against the costs thereof, but that they had refused to do so, and she was unable to obtain her rights, except by independent proceedings of her own. She also alleged that the Defendants, the executors, were personally interested in the residuary estate of the testator and in having the accounts already rendered accepted, and charged that they were acting in collusion with the Defendant *Christopher Yeatman* in refusing to take proceedings for the rectification of such accounts. The Plaintiff then claimed that a proper account should be taken of the capital of the partnership as it existed at the time of the testator's death, and of the dealings and transactions of the partnership from his death to the death of *Caroline Yeatman;* that the share of the Plaintiff in what should be found due to the executors of *Caroline Yeatman* at the foot of such account might be secured for her benefit; and that, if and so far as necessary, the estate of *Caroline Yeatman* might be administered under the direction of the Court.

The Defendant *Christopher Yeatman*, in his statement of defence, maintained that there was no privity between himself and the Plaintiff, and stated that he had paid *Caroline Yeatman* all that she was entitled to, and had settled all claims against him of the estate of *Caroline Yeatman* with her executors, his co-Defendants, and had received their discharge for the same; and both he and his co-Defendants, the executors, maintained that proper accounts had been delivered, which the executors alleged was the sole reason of their refusal to sue, and they respectively denied all personal interest or collusion in such refusal. The Defendants, the executors, also submitted to take such proceedings, if any, as the Court should direct.

Argument.

Hastings, Q.C., and *W. W. Cooper*, for the Plaintiff:—

It was the duty of the executors of *Caroline Yeatman* to sue *Christopher Yeatman;* and mere refusal by executors to sue is sufficient to entitle a residuary legatee such as the Plaintiff to maintain an action against the executors and the alleged debtor to the estate. It is only necessary to shew that there is some outstanding asset which, but for the suit, must be lost to the

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estate: *Bowsher* v. *Watkins* (1); *Lancaster* v. *Evors* (2); *Travis* v. *Milne* (3); *Stainton* v. *Carron Company* (4); *Hilliard* v. *Eiffe* (5). But if not, there has been collusion between the Defendants, the executors, and their co-Defendant, the partner, and there are in this case such special circumstances as entitle the Plaintiff to sue.

Argument.

Dickinson, Q.C., and *H. A. Giffard*, for the Defendants:—

Bowsher v. *Watkins* is no authority for the general proposition in support of which it has been cited, for there were special circumstances in that case which accounted for the decision of the Court: *Davies* v. *Davies* (6); and the same remark applies to all the other cases relied upon by the other side. In this case collusion is not proved, and there are no special circumstances to justify the action.

HALL, V.C.:—I cannot deal with this case without going into the merits.

The case was then gone into upon the merits, which do not call for further notice than will be found in the judgment.

Judgment.

HALL, V.C.:—

Before dealing with the facts and circumstances of this case, I will state what I consider to be the result of the cases to which I have been referred in reference to the competence of this Plaintiff to take the present proceedings.

I was referred by Mr. *Graham Hastings* to several cases as supporting the proposition that mere refusal to sue on the part of a legal personal representative was sufficient ground to entitle a person interested in the estate, whether as residuary legatee or next of kin, or, it might be, as legatee (supposing there not to be sufficient assets without the alleged assets outstanding), to bring an action against the legal personal representative, and the alleged debtor to the estate, even though, as in this case, the alleged debtor might be the representative of a former testator.

The first of these cases was *Bowsher* v. *Watkins*.

(1) 1 Russ. & My. 277.
(2) 4 Beav. 158.
(3) 9 Hare, 141.
(4) 18 Beav. 146.
(5) Law Rep. 7 H. L. 39.
(6) 2 Keen, 534.

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V.-C. H. 1877 YEATMAN v. YEATMAN. Judgment.

That case has been frequently cited, and there is apparently, in the report of the judgment, which is very short, some ground for saying that an opinion was there expressed by the Master of the Rolls which might warrant the general proposition that in every case where there is a refusal to sue, a residuary legatee might himself sue the alleged debtor—the alleged debtor in that case, as in many others, being a surviving partner. But that case has, as was stated during the argument, been commented upon on several occasions, and suffice it to say, in *Davies* v. *Davies* (1) and in *Wright* v. *Hamilton* (2), it is stated by the Judges who decided those cases that there were special circumstances in *Bowsher* v. *Watkins* (3) which accounted for the view that was taken by the Court; therefore it is not to be considered an authority establishing that a mere refusal to sue is sufficient to entitle a residuary legatee to institute an action against the debtor to the estate. I agree, therefore, with what was said by the Defendants' counsel here, that that case had better never be referred to again as supporting any such general proposition.

The next case was *Lancaster* v. *Evors* (4). That case, as I observed during the argument, cannot be considered as any authority whatever for the proposition in question, because there were special circumstances in it. It came on upon a demurrer to a bill containing averments which, for the purposes of the demurrer, must be taken to be true, that the fund in respect of which the creditor sued formed the only assets; and so far is the case from establishing any such general rule, that, on the contrary, the Master of the Rolls in his judgment, says: "I think that if this case did in other respects come within the general rule, the circumstances of the refusal of the executors to recover these, the only assets, would make the case an exception to the general rule."

Then there is the case of *Travis* v. *Milne* (5), where Lord Justice *Turner* thus states the rule (6): "Upon an examination of the authorities I believe it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which

(1) 2 Keen, 534.
(2) 3 J. & Lat. 481.
(3) 1 Russ. & My. 277.
(4) 4 Beav. 158.
(5) 9 Hare, 141.
(6) Ibid. 149.

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such a bill can be supported. The cases, I think, may be considered to go to this extent, that such a bill may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving parties. In the present case I entertain no doubt that the special circumstances are sufficient to maintain the bill." That is not an authority in favour of the proposition in question, but one which takes the rule to be otherwise, *i.e.*, that in the absence of special circumstances there is no instance of such a suit being maintained.

In the case of *Stainton* v. *Carron Company* (1), the Master of the Rolls states the rule thus (2): "I think it unnecessary to go in detail through all the cases to be found on this subject. I think that they may be summed up thus: that the persons interested in the estate of the testator, not being the legal representatives, will not be allowed to sue persons possessed of assets belonging to the testator unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate." That is a clear negative of the existence of any such rule as is contended for.

The only other case which was mentioned was that of *Hilliard* v. *Eiffe* (3). There is a judgment given in that case of the Vice-Chancellor of *Ireland*, in which he says (4): "The rule now appears to be subject to the exceptions of cases of collusion, of insolvency of the personal representatives, of refusal by them to sue, whether collusively or *bonâ fide*, or of the existence of what has been rather vaguely termed 'special circumstances.'"

I do not, however, consider that the Vice-Chancellor in that case laid down, or meant to lay down, any such rule as that mere refusal to sue would in any case be sufficient without the Court taking into consideration the circumstances of the particular case, and I cannot treat it as an authority of the Vice-Chancellor for such a proposition. But if his statement of the rule is to be construed and read otherwise, I must say I respectfully dissent from it, and I think that it is at variance with the other authorities to which I have been referred.

(1) 18 Beav. 146.
(2) Ibid. 159.
(3) Law Rep. 7 H. L. 39.
(4) Ibid. 44, n.

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V.-C. H. 1877 YEATMAN v. YEATMAN. Judgment.

[His Lordship then went into the case upon the merits, and, after considering the proper construction to be put upon the will of the testator, and the facts in evidence on either side, came to the conclusion that there had been an erroneous mode of dealing by *Christopher Yeatman* with the capital of the testator, which had the effect of diminishing the income of *Caroline Yeatman* for his own benefit, and amounted to a breach of trust on his part, that there was nothing during the life of *Caroline Yeatman* to bind her to accept that mode of dealing, and that the accounts rendered after her death were based upon this erroneous dealing and breach of trust, and did not amount to any such settlement of account as would deprive the residuary legatees under *Caroline Yeatman's* will of the right to have proper accounts taken. His Lordship accordingly directed an inquiry as to what was the capital of the testator at the time of his death, and a general account to be taken during the life of *Caroline Yeatman* between her and *Christopher Yeatman*, prefaced by a statement of the opinion of the Court that the whole amount of the testator's capital was, according to the true construction of the will, to be retained in the business during the life of *Caroline Yeatman*. In conclusion, His Lordship said:—]

Notwithstanding the view that I have taken of this case with reference to the right to sue, my impression rather is that it would be a correct holding to say that if the circumstances of any given case are such that upon an inquiry directed as to whether any and what proceedings should be taken, the Court upon the materials before it would come to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, there it would be a proper case to allow a party to sue in his own name. I do not mean to say that this would necessarily apply, supposing the executors, in a *bonâ fide* exercise of their discretion, had before come to a settlement of account and had settled with the parties sought to be made liable. I only mean that ordinarily that might form a fair test, as to whether a party should be allowed to institute such a suit after a refusal by the representatives to sue.

Solicitors: *J. Hales; Paterson, Snow, & Burney*, agents for *Jelb & Son, Boston.*

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ATTORNEY-GENERAL *v.* GASLIGHT AND COKE COMPANY.

FRY, J.
1877
Nov. 14, 15, 16.

[1876 A. 79.]

Unavoidable Nuisance—Gas—Metropolis Gas Act, 1860 (23 & 24 *Vict. c.* 125), *s.* 14—*Gas Works Clauses Consolidation Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 29—*Legal Obligation.*

By an Act of Parliament reciting that under a former Act incorporating the *Gas Works Clauses Act*, 1847, a gas company was under obligation to supply gas, the company was authorized to buy certain specified lands adapted for the purpose, the mode of supply was prescribed, and the gas was to be of a certain purity; but by this Act and the *Gas Works Clauses Act*, 1847, it was provided that nothing in those Acts contained should prevent the company from being liable to legal proceedings in consequence of making the gas:—

Held, that the company was not justified in causing a nuisance even if the gas could not be made of the requisite purity without so doing:

But *held*, on the evidence, that it was not shewn that by greater care and expense the nuisance might not be avoided.

Quœre, on the construction of the Acts, whether the company was under an obligation to supply gas.

Statement.

THIS was an action by way of information by the Attorney-General at the relation of the Local Board of Health for *West Ham*, in *Essex*, against the *Gaslight and Coke Company*, claiming an injunction to restrain the company from carrying on business in such a manner as to cause a nuisance.

In 1869 the *Imperial Gas Company* (which was afterwards amalgamated with the *Gaslight and Coke Company*), under the powers of the *Imperial Gas Act*, 1869 (1), bought land at *Canning Town*,

(1) *Imperial Gas Act*, 1869 (32 & 33 Vict. c. cxxviii), recites *Imperial Gas Act*, 1854, and "Whereas under the provisions of the *Metropolis Gas Act*, 1860, the company are placed under the obligation to supply with gas the district thereby confided to them." "And whereas the lands hereinafter described are well adapted for the purposes of the company's undertaking, . . . and it is expedient that the company should be authorized to purchase the same."

Sect. 44 directs the Board of Trade to appoint gas referees.

Sect. 52: "Such referees shall from time to time ascertain with what degree of purity the company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighbourhood in which the works are situate, and shall

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near *West Ham*, and built gasworks and made gas there. Ever since the gasmaking had begun, there frequently proceeded, as stated and proved by the relators and scarcely denied by the company, stinks of such intensity as to be a nuisance to the inhabitants of the district of *West Ham*, and the stink was in a great measure caused by the escape of sulphuretted hydrogen when the vessels used for the purification of the gas were emptied.

The company pleaded that the site of their works at *Canning Town* was approved of by the Legislature as well adapted for the purposes of their undertaking. They further pleaded and proved that they were situated in the midst of manufactories of a more or less offensive nature. They further pleaded that under the provisions of the *Metropolis Gas Act*, 1860 (1), with which was incorporated the *Gas Works Clauses Consolidation Act* (2), and of the

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thereupon prescribe and certify the maximum amount of impurity in each form with which gas supplied by the company should be allowed to be charged."

Sect. 54: "Gas supplied by the company shall be wholly free from sulphuretted hydrogen."

Sect. 88. "In addition to any lands which they are already empowered to purchase and hold, the company may from time to time purchase by agreement and hold all or any of the lands in the parish of *West Ham* hereinbefore described, and thereon or on any part thereof may construct works for the manufacture of gas . . . . Provided that nothing in this Act contained shall prevent the company from being liable to an indictment or information for nuisance, or to any other legal proceedings to which they may be liable in consequence of any such operations."

(1) *Metropolis Gas Act*, 1860 (23 & 24 Vict. c. 125), s. 14: "Every gas company from time to time supplying gas within any district shall, as to any premises or street within such district not already supplied with gas, and which shall lie within fifty yards of any existing mains, at their own expense, on being required by the owner or occupier of any premises within the district or in part within the district, who shall contract for not less than two years to pay gas rates in respect of such supply to an amount equal to twenty per cent. upon the outlay, provide and lay all proper and sufficient communication, service, and other pipes up to the premises of such owner or occupier, to communicate with the gas company's mains, and shall, if so required by the owner, occupier, or local authority, furnish him or them, at the rate prescribed by this Act, with a supply of gas for the purpose of being used in or on the premises, or for lighting the street."

(2) *Gas Works Clauses Consolidation Act* (10 & 11 Vict. c. 15), s. 29: "Nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas."

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Imperial Gas Act, 1869, they were compelled, under heavy penalties, to supply gas of a certain purity, and were obliged to adopt certain processes, which were the best and only processes known to science for this purpose.

At the trial witnesses were examined on both sides, and the effect of their evidence is stated above and in the judgment as given below. In the course of the trial it was proved that great quantities of stinking lime from the purifiers were brought in barges from the company's works at three other places and deposited at *Canning Town Works*, one witness attributing about half of the stink complained of to this proceeding. It appeared also that the gas referees had fixed a certain standard of purity for gas made in works within *London*, and a higher standard for gas made in the suburbs, where higher purification might, in their opinion, be effected without causing a nuisance. The standard applicable to this case was twenty grains of impurity for every 100 feet. It further appeared that the greater the purity the greater was the stink produced in the process of purification.

Statement.

Kay, Q.C., *Aston*, Q.C., *Bardswell*, and *R. E. Webster*, in support of the information:—

Argument.

Most of the nuisance is occasioned by the emission of sulphuretted hydrogen when the purifiers are opened, and this may well be prevented, no doubt with expense and trouble, but that is no reason why the neighbourhood should suffer from a nuisance. The company are not compelled to make gas, but if they do they must, no doubt, supply it as prescribed by the Acts of 1860 and 1869. These Acts, however, and also the general Act of 1847, carefully preserve the rights of the public. *Attorney-General* v. *Leeds Corporation* (1) was a similar case, but stronger than this. Nuisance is well defined in *Soltau* v. *De Held* (2).

Benjamin, Q.C., *Davey*, Q.C., *A. L. Smith*, and *Hornell*, for the company:—

The Act of 1860 in fact orders us to supply gas of a certain standard of purity, and we cannot do so without causing some nuisance. The place for our works was fixed on by Parliament as

(1) Law Rep. 5 Ch. 583. (2) 2 Sim. (N.S.) 133, 142.

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well adapted for our purpose. The Legislature must have contemplated a certain amount of nuisance, as in *Attorney-General* v. *Conservators of the Thames* (1). They must prove that we carry on our business negligently. Under sect. 14 of the Act of 1860 we are bound to supply gas.

Argument.

[FRY, J.:—Where is the obligation? If you do supply gas, you must supply it in the prescribed manner, but are you obliged to make gas? Might you not cease to carry on business? Would a mandamus lie to compel you to make gas?]

It is not certain that a gas company could cease to make gas. The company is authorized to make gas at this place, and is obliged to make it of a certain purity, which it is impossible to do without causing some nuisance, and the company is therefore justified: *Rex* v. *Pease* (2); *Mersey Docks Trustees* v. *Gibbs* (3). Moreover, we contend that the referees have fixed the standard higher than the Legislature contemplated, and so compel us to make the nuisance.

Judgment.

FRY, J.:—

This is an information by Her Majesty's Attorney-General at the relation of the Local Board of Health for the district of *West Ham*, against the *Gaslight and Coke Company* as Defendants, and it prays for an injunction to restrain the Defendants from carrying on business at their works at a place called *Canning Town*, not far from the shore of the *Thames*.

This information is filed upon the ground of public nuisance to Her Majesty's subjects; and it was admitted by the learned counsel for the Defendants that a public nuisance had been created, and therefore it would appear, at first sight, a matter of course that an injunction should go in the terms of that prayer. But on behalf of the Defendants the nuisance was justified, and their argument was this: "We are under an obligation to supply gas to a given metropolitan district, which is defined by the *Metropolis Gas Act*, 1860, and by the *Imperial Gas Act*, 1869; we are further under an obligation to supply that gas with not more

(1) 1 H. & M. 1. (2) 4 B. & Ad. 30.
(3) Law Rep. 1 H. L. 93.

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than twenty grains of impurity for every 100 cubic feet of gas manufactured and supplied. Further, under the Act of 1869 we had authority to take the land at *Canning Town* on which we are carrying on our manufacture, and we undertake to prove, as a matter of fact, that we cannot perform the obligation so cast upon us by the Acts of 1860 and 1869 without creating a nuisance, and therefore we are justified." Now, I think that to all those arguments two sufficient replies have been given. In the first place, it is to be borne in mind that the *Gas Works Clauses Act*, 1847, contains in sect. 29 an express provision that nothing in that Act, or in the special Act, shall prevent the undertakers from being liable to legal proceedings to which they might be liable in consequence of the making or supplying of gas. That Act, except so far as its provisions are inconsistent with the Act I am about to refer to, was incorporated with the *Metropolis Gas Act* of 1860. Therefore I take it to be clear that the whole of the obligations imposed by the Act of 1860 were made liable to that condition, and that a company performing the obligations of the Act of 1860 could not justify themselves by setting up incapacity to make or supply gas without creating a nuisance. I therefore think that the foundation of that argument fails on the question of construction.

But even if it did not fail, I am of opinion that the Defendants have not succeeded in their justification. It is to be borne in mind that the full burden of proof in this case rests entirely upon those who say that they cannot, without creating a nuisance, do a thing which they are bound to do. That would be the result of the ordinary rule of law upon the subject; and in this instance it is especially the case, because by the Act of 1869 a maximum of impurity is to be fixed by the referees, and the referees are from time to time to ascertain with what degree of purity the company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighbourhood. Gentlemen of eminence and skill have been appointed referees. They have, in the discharge of their duty, fixed a maximum, and they have fixed it at an amount which in their judgment may be reasonably required without occasioning a nuisance to the neighbourhood in which the works are carried on. There is, therefore, the judgment

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of the public officers appointed for the purpose, to the effect that this maximum can be obtained without occasioning a nuisance to the neighbourhood. The Defendants say, and say truly, that in this Court the judgment of those referees is not binding, and that they are at liberty to shew that the referees have fallen into error. They have accordingly had an opportunity of convincing me of this, if they could do so. They have given abundant evidence with that view; but they have failed, in my judgment, to discharge the burden of proof cast upon them by the general law, and by the particular Act to which I have referred.

It is not necessary for me to say whether, if the affirmative had been on the Plaintiffs, I should have come to the conclusion that the gas might be manufactured at the required degree of purity without committing a nuisance. It is enough for me to say that the Defendants, on whom the burden rests, having to convince me, have failed.

Now I have had before me the evidence of many gentlemen. Mr. *Vernon Harcourt*, one of the referees, has confirmed on oath in his evidence here, subjected to cross-examination, the opinion in which he had concurred as a referee. He visited these works in January of this year, and the result of the evidence on the part of the Defendants is, that I must take the mode of proceeding at that time to be at least as favourable as it was during any portion of the time which is in controversy in this litigation; and Mr. *Vernon Harcourt* has pointed out what he considers to be defects in the precautions taken by the Defendants at these works. He has contrasted the mode they used there with the mode they used at *Fulham*. In his opinion the *Fulham* process was conducted much more carefully and more skilfully, and it was more adapted to prevent nuisance than the process used at these works. Now, has that been displaced by the evidence given before me? In my opinion it has not. I am not satisfied on the evidence that there has been throughout the whole of the period of controversy, from May, 1874, to 1876, due care in the covering up of the foul lime. I am not convinced that with a little more diligence, a little more zeal, and a little more expense, other methods might not have been used which would have been more effectual than the methods which were used. On the contrary, I

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think the evidence goes strongly to shew that there were methods which had been used as early as 1874, and were more successful than the methods used during the period to which the litigation relates.

In coming to this conclusion, I therefore base myself not exclusively on the evidence of Mr. *Harcourt*, but also on the evidence of the other witnesses for the relators, leading me to the conclusion that something more could have been done. Nor is that conclusion, in my mind, disturbed by the evidence given by the scientific witnesses of the Defendants. They do not pledge themselves to say that nothing more could have been done than was done. Some of them refer to an element of practicability. On that point I am not satisfied that more was not practicable than was done, even having regard to the question of expense; I can only, therefore, come to the conclusion that, the burden resting on the Defendants to prove that they have done everything they possibly could to prevent the nuisance, they have not discharged that burden, even if discharging it would have justified them.

Being of this opinion, it follows that the injunction must go.

But there is one other fact to which it is impossible that I should not advert, and which, in my opinion, is conclusive of this litigation, irrespective of the conclusion I have arrived at with regard to the general process. It is this: from some time in the year 1874 down to the month of September, 1876, the whole of the refuse lime from three other works of the company was brought in barges to a dock upon this land; was transhipped from the barges to trucks without being covered over with breeze or anything else to protect it from the operation of the air, and was then carried upon those trucks and was tipped out on the land, where, no doubt, it was covered. That evidence before me is, to my mind, conclusive to shew that the operation must have been attended with a great increase of the nuisance from the works, estimated by one of the witnesses at something like half of the whole smell and nuisance which resulted from the operations carried on there. Now, it is not pretended there was any obligation to do this: and with regard to this it appears to me that the case is really undefended, and that the suggestion that the injunction should be limited to this act because this act was

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not connected with the immediate process of manufacture on the land is not well founded. This appears to me enough, as regards the period in controversy, to justify the injunction. The Defendants were committing upon their land that which is admitted to be a public nuisance, and they were not doing so under any statutory obligation. The injunction must, therefore, go in the terms asked for, and, of course, the costs must be paid by the Defendants.

Solicitors for Relators: *Hillearys.*
Solicitors for Defendants: *Willoughby & Cox.*

FRY, J.
1877
Nov. 20.

RICHARDS *v.* REVITT.

[1876 R. 84.]

Restrictive Covenant—Lessee with Notice—Acquiescence—Substantial Damage.

Where the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant.

An assignee of land with notice of a covenant is subject to the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other.

Statement.

BY an indenture of conveyance dated the 5th of September, 1864, the *Essex Freehold Land Company*, the vendors of certain lots of building land at *Leytonstone*, covenanted with the Plaintiff, *Thomas Richards*, and with each of the other purchasers of the lots, so far only as regarded the lot or lots then unsold, and so as to bind such lot or lots in the hands of any person or persons to whom the same might thereafter be sold, that no tavern, beerhouse, or place licensed for the sale of any liquors be opened or conducted, nor the business of a licensed victualler be carried on upon any of the said lots. One of the lots called Lot 55 remained unsold, and was in 1869 sold and conveyed by the *Land Company* to one *Samuel Tipper*. By an indenture of lease dated the 21st of July, 1875,

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Samuel Tipper demised the house built on Lot 55 (described in the indenture of lease as No. 1, *Market Place*) to the Defendant *Joseph Revitt* for twenty-one years, *Revitt* covenanting not to use or carry on any noxious, noisome, or offensive trade other than the trade or business of a grocer, provision dealer, or vender of wines, spirits, bottled ale, stout, or porter. The Defendant *Revitt* was held on the evidence to have had, at the time when this lease was granted, notice of the covenants in the conveyance to the Plaintiff. The Defendant had been the occupier of No. 1, *Market Street*, since 1869, and had since that time held licenses to sell wines and spirits, but the extent of his sales and the Plaintiff's knowledge thereof were in dispute. He now held a license for the sale of wines and spirituous liquors, and sold them in considerable quantities. The Plaintiff, who, besides the lot so purchased by him, was the owner of a tavern in the neighbourhood, brought this action to restrain the use of any building erected on Lot 55 for the sale of any liquors, or for any of the purposes prohibited by the deed of conveyance of the 5th of September, 1864.

Statement.

At the trial witnesses were examined on both sides, and the effect of the evidence is stated above and in the judgment of the Court.

Kekewich, Q.C., and *Shebbeare*, for the Plaintiff:—

Argument.

The Defendant had notice of the restrictive covenant, and is therefore bound by it: *Tulk* v. *Moxhay* (1); *Wilson* v. *Hart* (2). As to the defence that the Plaintiff had acquiesced, it does not follow that because he had not rushed into litigation to prevent insignificant breaches of a covenant he is now to lose his rights: *Kerr* on Injunctions (3); *Johnson* v. *Wyatt* (4).

Cookson, Q.C., and *Bilton*, for the Defendant:—

The Plaintiff has not proved that he has received substantial, or indeed any damage: *St. Helen's Smelting Company* v. *Tipping* (5). He was not a party to the covenant and could not have recovered damages at law, and is now proceeding on equitable grounds, and

(1) 2 Ph. 774.
(2) 2 H. & M. 551; Law Rep. 1 Ch. 463.
(3) Page 226.
(4) 2 D. J. & S. 18.
(5) 11 H. L. C. 642.

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no injunction will be granted unless the damage is substantial. He is also estopped by acquiescence and by allowing the Defendant to go on and establish his business, and then, when the business became prosperous, try to stop him: *Dann* v. *Spurrier* (1).

Judgment.

FRY, J., after stating the facts, continued:—

The result is that, according to *Tulk* v. *Moxhay* (2), and that class of cases, the Defendant, having notice of the covenant, is bound by it.

But a further defence of acquiescence and encouragement is set up. Now this is the trial of the action, and I cannot at this stage of the proceedings refuse, on the ground of acquiescence, to give the Plaintiff relief, unless I decide that his remedy is for ever lost. But what are the facts as to acquiescence. [His Lordship then stated the principal evidence on the subject.] Upon this evidence I hold that the Plaintiff was not fixed with knowledge that from 1870 the Defendant was selling foreign wines; and the only case is as to his knowledge that the Defendant was selling British wines. That breach of the covenant was only in respect of a small class of goods, but the present breach is wider, and extends to much more important classes of goods—wine, spirits, ale, and porter. The fact that the Plaintiff did not interfere to prevent a small and limited breach does not conclude him for all time in respect of a wider and more important breach. Besides, the Plaintiff did actually remonstrate on hearing of the proposed lease to the Defendant. I therefore hold that there has been no such acquiescence by the Plaintiff as to prevent him from obtaining relief.

Another argument brought forward for the Defendant was that we have not here an express and direct contract, and that in a case where the Court proceeds on the ground of notice, substantial damage must be shewn in order that an injunction may be granted. The cases, however, do not support this contention. *Wilson* v. *Hart* (3) was fully argued, and such an argument would undoubtedly have been used if it could have been maintained. There the Plaintiffs could not have sustained substantial damage,

(1) 7 Ves. 231. (2) 2 Ph. 774.
(3) Law Rep. 1 Ch. 463.

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but an injunction was granted. That case, therefore, seems a direct authority that notice of a covenant puts the Defendant in the same position, and that the Court will proceed exactly as if he were a party to the covenant. I therefore overrule that objection, and the injunction must be granted.

Solicitors for Plaintiff: *Houghtons & Byfield.*
Solicitor for Defendant: *A. W. Sadgrove.*

LUKER *v.* DENNIS.

[1876 L. 242.]

Restrictive Covenant as to Land—Assignee with Notice—Public-house—Covenant to buy Beer of one Brewer only—Implied Condition to supply good Beer.

The lease of a public-house granted by a brewer to a publican contained a covenant by the latter for himself, his executors, administrators, and assigns, to purchase from the brewer all the beer consumed at that public-house, and also at another public-house of which the publican held a lease under a different landlord:—

Held, that the covenant was binding in equity upon an assignee of the second public-house who had notice of the covenant.

Keppell v. *Bailey* (1), so far as it is a decision that a restrictive covenant as to the use of land, which does not run with the land at law, is not binding in equity upon an assignee with notice, has been overruled by more recent cases.

The lease of the first public-house contained also a covenant by the brewer that he would supply the publican with all the beer required for consumption at both the public-houses, such beer to be of a specified quality and price:—

Held, that the obligation of the lessee's covenant was conditional upon the performance by the lessor of his covenant.

The assignee of the lease of the second public-house borrowed money of the brewer upon the security of a mortgage of that lease, and in the mortgage deed he covenanted with the brewer to buy of him all the beer consumed at that public-house:—

Held, that this covenant was subject to an implied obligation on the part of the brewer to supply good marketable beer.

THIS was an action by a firm of brewers against a publican to restrain him from purchasing the beer sold by him at the public-

(1) 2 My. & K. 517.

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house from any other brewer in violation of covenants by which, as the Plaintiffs alleged, he was bound.

By an indenture dated the 27th of December, 1873, *Thomas Worraker* demised to *James Crabb* a public-house called the *Milton Arms*, at *Southend*, in *Essex*, for the term of twenty-eight years from the 25th of December, 1873.

Thomas Usborne was, in March, 1874, a brewer at *Stanbridge*, in *Essex*, and was the owner in fee of a public-house called the *Sutton Arms*, situate on the road from *Leigh* to *Southchurch*, in *Essex*, and he agreed to demise the same to *James Crabb* and *Henry Dennis*. *Usborne* afterwards contracted with *John George Baxter*, *George John Baxter*, and *Henry Luker*, who carried on the business of brewers at *Southend* under the firm of *Luker & Co.*, for the sale to them of the *Sutton Arms*, and also of his business of a brewer carried on at *Stanbridge*.

By an indenture dated the 31st of March, 1874, *Usborne*, in pursuance of his agreement, and with the concurrence of *Luker & Co.*, demised the *Sutton Arms* to *James Crabb* and *Henry Dennis*, their executors, administrators, and assigns, for the term of ninety-nine years from the 29th of September, 1873. By this deed (among other things) *James Crabb* and *Henry Dennis*, for themselves, their heirs, executors, administrators, and assigns, and as a separate covenant each of them thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with *Usborne*, his heirs and assigns, and as a separate covenant with the *Baxters* and *Luker*, their heirs, executors, administrators, and assigns, that they the lessees, their executors, administrators, and assigns, would have and purchase from *Usborne*, his heirs or assigns, until the completion of the sale to the *Baxters* and *Luker*, and, after such completion, of and from the *Baxters* and *Luker*, their executors, administrators, or assigns, all the beer, porter, and malt liquors which should be sold or consumed upon the beer-house called the *Sutton Arms* during the term thereby granted, and also upon the public-house called the *Milton Arms*, at *Southend*, "whereof, also, the said lessees are tenants, for all the residue of their existing tenancy of twenty-one years from the 29th of September, 1873." And *Usborne*, for himself, his heirs, executors, administrators, and assigns, and the *Baxters* and *Luker*, for them-

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selves, their executors, administrators, and assigns, thereby covenanted with the lessees, their executors, administrators, and assigns, that the covenantors, their heirs or assigns, should and would respectively supply the lessees, their executors, administrators, or assigns, with all the beer, porter, and malt liquor which they might require for sale or consumption upon the houses called the *Milton Arms* and the *Sutton Arms*, such beer, porter, and malt liquor to be of the same quality and price as that then supplied by *Usborne & Co.* to the houses in the neighbourhood from their *Stanbridge Brewery*, and subject also to the same deductions as were made on such sales, together with a further deduction of 5 per cent. on the price of the articles so supplied to the *Milton Arms*. The sale by *Usborne* of the *Sutton Arms* and the brewery business to the Plaintiffs was afterwards completed.

By an indenture dated the 23rd of May, 1874, *Crabb* assigned the *Milton Arms* to *Benjamin Dennis*, the Defendant, his executors, administrators, and assigns, for the residue of the term of twenty-eight years granted by the lease of the 27th of December, 1873. The Defendant entered into possession of the *Milton Arms* and carried on there the business of a publican. In June, 1874, the Plaintiffs lent the Defendant £250, and to secure the repayment thereof he, by an indenture dated the 8th of June, 1874, demised the *Milton Arms* to *Luker & Co.* and their assigns, for the residue of the term of twenty-eight years granted by the lease of the 27th of December, 1873 (except the last two days thereof), subject to a proviso for redemption on payment of the £250 with interest, as therein mentioned. And, in consideration of *Luker & Co.* having agreed to make the advance of £250 to the Defendant, he, for himself, his executors, administrators, and assigns, and for the tenants and occupiers for the time being of the *Milton Arms*, covenanted with *Luker & Co.* and their assigns, and with the owners or other person or persons for the time being in actual possession of the brewery then carried on or occupied by *Luker & Co.* at *Southend*, and with each and every of them, that the Defendant, his executors, administrators, and assigns, and the occupiers for the time being of the *Milton Arms*, would at all times during the residue of the term of twenty-eight years take and purchase of the covenantees, or of some or one of them, their or some or one

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of their executors, administrators, or assigns of the benefit of this covenant, or of such person or persons as they or he might direct, all beer, ale, porter, malt liquors, wines, spirits, and spirituous liquors and compounds which should be brought by the Defendant, his executors, administrators, or assigns, into the *Milton Arms* or other premises held in connection therewith; and all such liquors and exciseable commodities as might be sold by him or them under any special or occasional license granted to the occupier of the *Milton Arms* for the time being. And it was thereby covenanted, agreed, and declared, that this covenant was to be observed, performed, and carried out whether the £250 and the other moneys thereby secured were repaid by the Defendant or his assigns, or recovered by the Plaintiffs or not. Provided that, if the Defendant or his assigns should pay to *Luker & Co.* all moneys due from him under the security thereinbefore contained, he should be at liberty to deal with whomsoever he pleased for wines, spirits, and spirituous liquors (but not for malt liquors), anything therein contained to the contrary notwithstanding. In November, 1875, the Defendant repaid to the Plaintiffs the moneys secured by this indenture.

The action was commenced on the 16th of November, 1876, and by the statement of claim the Plaintiffs alleged that the Defendant had for some time past refused, and still refused, to purchase the beer, ale, porter, and malt liquors sold and consumed at the *Milton Arms* from the Plaintiffs, or to observe the covenants contained in the deed of the 31st of March, 1874, or the 8th of June, 1874, but purchased the same from other brewers, although the Plaintiffs were ready and willing and had offered to supply the Defendant with such beer, ale, porter, and malt liquors of good quality in requisite quantities and at fair and reasonable prices, in accordance with their covenants.

The Plaintiffs claimed an injunction to restrain the Defendant from breaking the covenants; damages for breaches of the covenants; and the costs of the action.

By his statement of defence the Defendant denied that he had become bound by any of the covenants contained in the deed of the 31st of March, 1874, but he said that if he ever did become bound to observe those covenants, such observance was conditional

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on the performance by the Plaintiffs of the covenant on their part contained in the same deed. And he said that in breach of that covenant the Plaintiffs had supplied to him for the use of the *Milton Arms*, beer, porter, and malt liquors, at a higher price than, and of a quality far inferior to, that supplied by *Usborne & Co.* to the houses in the neighbourhood, and in fact of a kind so bad and unwholesome as to be unfit for the use of the Defendant's customers. And as to the covenant contained in the mortgage deed of the 8th of June, 1874, the Defendant submitted that the Plaintiffs, after the execution of that deed and by reason of it, became subject to an implied obligation to supply to the Defendant, for the use of the *Milton Arms*, beer, porter, and malt liquors of a good and wholesome quality, whereas they had, in fact, supplied him with bad and unwholesome beer and other malt liquors, by reason whereof, as he submitted, he was justified in discontinuing to purchase beer and other malt liquors from the Plaintiffs.

This was the trial of the action.

It was admitted on behalf of the Defendant that he had, when he took the assignment of the lease from *Crabb*, a general knowledge that the *Milton Arms* was tied to the *Sutton Arms*, and that they were both subject to some arrangement for taking beer from the Plaintiffs.

Argument.

North, Q.C., and *Jason Smith*, for the Plaintiffs:—

The Defendant admits that he knew enough to put him upon inquiry as to the nature of the obligation, and he was therefore bound to inquire. If the Plaintiffs have supplied bad beer, that might be an answer to an action for breach of the Defendant's covenant, if he on that occasion bought beer elsewhere, but it would not entitle the Defendant to say that the covenant had been put an end to altogether.

[FRY, J.:—Suppose the Plaintiffs continued to supply bad beer to such an extent as to lead to the inference that they would always do so, would the Defendant be bound to go on dealing with them for ever?]

Possibly a time might come when he would be released. No doubt, if they supplied something which was not beer, for instance,

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water, the Defendant might be released. If bad beer was supplied for a month, and after that good beer was supplied, the Defendant would not be justified in buying his beer elsewhere, and if he did so, the Plaintiffs would recover substantial damages in an action on the covenant: *Weaver* v. *Sessions* (1); *Jonassohn* v. *Young* (2).

[FRY, J., referred to *Withers* v. *Reynolds* (3).]

Meadows White, Q.C., and *G. W. Lawrance*, for the Defendant:—

If the Defendant is bound at all by the covenant in the deed of the 31st of March, 1874, it is because he had notice of it. But in all the cases in which it has been held in equity that an assignee with notice is bound by a restrictive covenant as to the use of land, there has been an antecedent relation, such as that of vendor and purchaser, or that of lessor and lessee, existing, independently of the covenant between the original covenantee and covenantor: *Tulk* v. *Moxhay* (4); *Schreiber* v. *Creed* (5); *Coles* v. *Sims* (6); *Catt* v. *Tourle* (7). *Keppell* v. *Bailey* (8) is a distinct authority that if no such antecedent relation existed the covenant would not be binding in equity on an assignee with notice. In the present case no relation *dehors* the covenant existed between the Plaintiffs or their predecessors and *Crabb* and *H. Dennis* with regard to the *Milton Arms*. Therefore *Keppell* v. *Bailey* applies.

[FRY, J., referred to *Wilson* v. *Hart* (9).]

Secondly, the covenant by the lessees in the deed of the 31st of March, 1874, is dependent upon that of the lessors in the same deed; if they are not ready and willing to fulfil their covenant, the Defendant is released from his covenant. If he can prove a succession of breaches by the Plaintiffs, the Court will infer that they are not ready and willing to fulfil their covenant, and then the Defendant will be released: *Coward* v. *Gregory* (10). Again, the Defendant's own covenant in the mortgage deed is subject to an implied obligation on the part of the Plaintiffs to supply him

(1) 6 Taunt. 154.
(2) 4 B. & S. 296.
(3) 2 B. & Ad. 882.
(4) 2 Ph. 774.
(5) 10 Sim. 9.
(6) Kay, 56.
(7) Law Rep. 4 Ch. 654.
(8) 2 My. & K. 517.
(9) Law Rep. 1 Ch. 463.
(10) Ibid. 2 C. P. 153.

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with good beer—beer fit to drink: *Holcombe* v. *Hewson* (1); *Cooper* v. *Twibill* (2); *Thornton* v. *Sherratt* (3); *Stancliffe* v. *Clarke* (4).

There is a *dictum* of Lord Justice *Selwyn* to the same effect in *Catt* v. *Tourle* (5). Suppose the Plaintiffs became bankrupt, or that for any other reason, for a year or for a month, they could not supply the Defendant with beer, the covenant would be at an end. The Defendant's trade depends upon his supplying his customers with a good marketable beer, and the Plaintiffs are bound (with reasonable exceptions) always to supply him with such an article. Again, it is an unreasonable stipulation that the covenant in the mortgage deed should continue after the repayment of the debt: *Mitchel* v. *Reynolds* (6).

Lastly, the covenant in the deed of the 31st of March, 1874, could not lawfully be entered into by the tenants of one house, the *Milton Arms*, with the landlord of another, the *Sutton Arms*.

[FRY, J., referred to *Ackroyd* v. *Smith* (7).]

The Court has a discretion as to granting an injunction, and will not do so if no damages could be given.

North, in reply:—

[FRY, J., asked whether the Defendant could be bound by the covenant in the deed of the 31st of March, 1874, inasmuch as he was the assignee from *Crabb* of a term of twenty-eight years from the 25th of December, 1873, whereas *Crabb* and *Dennis* were described in the deed of the 31st of March, 1874, as having a tenancy of twenty-one years from the 29th of September, 1873.]

That term must be subsisting or it must have been surrendered, and the Defendant, having had notice of the deed of the 31st of March, 1874, is estopped from setting up a surrender as against the Plaintiffs: *Piggott* v. *Stratton* (8).

Then, as to the effect of notice. *Keppell* v. *Bailey* (9) was not really decided upon the effect of notice; the real question there was whether the covenant ran with the land. If *Keppell* v. *Bailey*

(1) 2 Camp. 391.
(2) 3 Camp. 286, n.
(3) 8 Taunt. 529.
(4) 7 Ex. 439, 446.
(5) Law Rep. 4 Ch. 659.
(6) 1 P. Wms. 181.
(7) 10 C. B. 164.
(8) Joh. 341; 1 D. F. & J. 33.
(9) 2 My. & K. 517.

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is an authority on the question of notice, it has been practically overruled by the more recent cases. In none of them did the decision depend upon the existence of any antecedent relation between the covenantor and the covenantee. The equitable doctrine of notice has been largely developed since *Keppell* v. *Bailey* (1). This clearly appears from *Catt* v. *Tourle* (2), and from the observations of Lord Justice *Knight Bruce* in *De Mattos* v. *Gibson* (3). At any rate, it is sufficient that the relation of lessor and lessee existed between the covenantees and the covenantor with respect to the *Sutton Arms*. It was all one bargain.

And, with regard to the inter-dependence of the two covenants in the deed of the 31st of March, 1874, and the supposed implied obligation of the Plaintiffs arising on the Defendant's covenant in the mortgage deed, the Defendant must go so far as to shew that we are not ready and willing to supply him with good merchantable beer: *Freeth* v. *Burr* (4). All that he alleges by his statement of defence is that we have supplied unwholesome beer. That is not sufficient.

Judgment.

FRY, J.:—

I have to determine three points of law before going into the evidence. The first question raised is whether the covenant contained in the deed of the 31st of March, 1874, was binding on the Defendant who claims title to the *Milton Arms* under the assignment of the 23rd of May, 1874. On this question the first difficulty which arises is this, that in the deed of the 31st of March, 1874, the interest in the *Milton Arms* which is represented as existing in *Crabb* and *Henry Dennis* is a tenancy of twenty-one years from the 29th of September, 1873, whereas the interest of which the Defendant is the assignee is, not that term, but another term of twenty-eight years granted to *Crabb* and commencing on the 25th of December, 1873. To that difficulty I think Mr. *North* has given a conclusive answer. He says the Defendant admits notice of the covenant, and he is in possession of the property. He mus further admit either that the term of twenty-one years is still subsisting, or that it has been surrendered by *Crabb* and *Henry*

(1) 2 My. & K. 517.
(2) Law Rep. 4 Ch. 654.
(3) 4 De G. & J. 276, 282.
(4) Law Rep. 9 C. P. 208.

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Dennis, and he, claiming through *Crabb*, cannot, any more than *Crabb* himself could, set up that surrender against the third person with whom he entered into the restrictive covenant, and he can only hold the property subject to that covenant which was entered into for the benefit of that third person. This assumes that the covenant is binding upon the Defendant as being an assign with notice of the covenant, and then arises the question whether the covenant is binding on him. The case of *Keppell* v. *Bailey* (1) is relied upon by the Defendant. In that case the owners of some ironworks had joined with some other persons in forming a joint stock company to construct a railway for the purpose of connecting a lime quarry with the ironworks and with other works, and with a canal, and in the partnership deed of the railway company there was a covenant by the owners of the ironworks, for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, to procure all the limestone used in the ironworks from the lime quarry, and to convey all the limestone, and also the ironstone from their mines, to their works along the railway, and to pay a fixed toll; and it was held by Lord *Brougham* that this covenant did not run with the land, and was not binding at law upon a person who had purchased the ironworks, and that he was not bound in equity by reason of his having purchased with notice of the covenant. Lord *Brougham* said (2): "The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorizes him to affect by his contracts—had attempted to create a real burthen upon property which is inconsistent with the nature of that property, and unknown to the principles of the law—cannot bind such assignee by affecting his conscience."

It is contended that that case must have been differently decided if the equitable doctrine of notice was applicable to such a covenant. But it was truly observed by Mr. *North* that at the time when *Keppell* v. *Bailey* was decided the equitable doctrine of notice had not received the development which it has since received. It is admitted that there is a large class of cases in which persons have been held to be affected by implied notice of covenants of this kind. But it is said that in all these cases some antecedent rela-

(1) 2 My. & K. 517. (2) 2 My. & K. 547.

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tion, such as that of vendor and purchaser, or lessor and lessee, existed between the covenantee and the covenantor with respect to the land sought to be affected by the covenant independently of the covenant, and that the doctrine of notice ought not to be pushed beyond cases of that kind. On the other hand, I am pressed by the language of Lord Justice *Knight Bruce* in *De Mattos* v. *Gibson* (1), in which he laid down this very general proposition: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." And I am further pressed with this, that the doctrine thus laid down formed the basis of the judgment of the Court of Appeal in *Catt* v. *Tourle* (2).

The question I have to consider is whether I am bound by *Keppell* v. *Bailey* (3) after those observations of Lord Justice *Knight Bruce*, after the mode in which they were applied by the Court of Appeal in *Catt* v. *Tourle*, and after the long series of cases, of which *Wilson* v. *Hart* (4) is a well-known example, in which the distinction which is now suggested does not seem to have been raised or to have occurred to the Judges. I think I must come to the conclusion that I am not bound by *Keppell* v. *Bailey* so far as it relates to the effect of notice of a covenant of this nature. I think it cannot be reconciled with the more recent cases, and it is more straightforward to say this than to attempt to draw refined distinctions. I think, therefore, that I am bound to give effect to the equitable doctrine of notice, notwithstanding *Keppell* v. *Bailey*. Mr. *North* also argued that, even if *Keppell* v. *Bailey* is still binding on me, this is a case in which the relation of landlord and tenant existed, inasmuch as the same deed dealt with the *Sutton Arms* and created a tenancy in respect of them. In my view of the authorities, however, it is unnecessary to determine that question. I hold, therefore, that the covenant in the

(1) 4 De G. & J. 282.
(2) Law Rep. 4 Ch. 654.
(3) 2 My. & K. 517.
(4) Law Rep. 1 Ch. 463.

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deed of the 31st of March, 1874, is binding upon the Defendant, who had notice of it when he took the assignment of the lease of the *Milton Arms*.

The next question is, what is the true construction of that covenant? It cannot, in my view, be an absolutely unconditional covenant; it must, from its very nature, subsist only so long as the Plaintiffs are willing to supply beer to the *Milton Arms*. And if it stood alone, I should hold that it was subject, at any rate, to some implied condition. But there is also in the deed the subsequent covenant on the part of the Plaintiffs that they will supply beer of a certain quality and at certain prices. Finding these two covenants in the same deed, I think it is more reasonable to hold that, so far as the two are correlative, the first is conditional on the observance of the second, than to say that the first is subject to some implied condition, and that the second is an entirely independent covenant.

With regard to the covenant contained in the mortgage deed of the 8th of June, 1874, there is really very little in controversy. It is, in my opinion, a covenant conditional on a supply being made by the Plaintiffs of good marketable beer. Various expressions are used in the cases which have been referred to, but I think they all really amount to the same thing. In one case the term "good and wholesome beer" is used, in another "good marketable beer." I see no objection to any of these expressions.

The question which I shall have to try with regard to the covenant in the first deed will be whether the Plaintiffs have supplied the Defendant with beer according to their covenant; and the question on the covenant in the second deed will be whether the Plaintiffs have supplied the Defendant with beer of a good marketable quality. On these points evidence may be adduced. The question what amount of neglect on the part of the Plaintiffs will relieve the Defendant from his covenant still remains open.

One of the Plaintiffs was then called and examined, but before his examination was concluded the parties arranged terms of compromise.

Solicitor for Plaintiffs: *W. R. Preston.*
Solicitor for Defendant: *John Hudson.*

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C. J. B. 1877 Dec. 3.

In re SILLENCE. *Ex parte* SILLENCE.

Appeal—Time within which Appeal Notice must be sent to the Registrar of the Court appealed from—"Forthwith"—Bankruptcy Act, 1869, *s.* 71—*Bankruptcy Rules*, 1870, *rr.* 143, 144.

Rule 144 of the Bankruptcy Rules, 1870, requires that upon entering an appeal a copy of the appeal notice shall be sent "forthwith" to the Registrar of the Court appealed from:—

Held, that "forthwith" must be read with reference to the period of twenty-one days within which, by rule 143, a notice of appeal must be entered with the Registrar of Appeals, and that it means within twenty-one days from the date of the order appealed from, or as soon as possible afterwards.

Where the order appealed from was made on the 22nd of August, and notice of appeal was duly left and entered with the Registrar of Appeals and a deposit paid, but a copy of the appeal notice was not served on the Registrar of the Court appealed from until the 12th of November:—

Held, that the appeal was out of time and irregular, and that it could not be heard.

Statement.

THIS was an appeal from the County Court at *Winchester*.

The adjudication of the bankrupt, *James Sillence*, was made in December, 1876, and the Registrar of the County Court at *Winchester* was appointed trustee.

The order now appealed from was made on the 22nd of August, 1877.

In accordance with rule 143 of the Bankruptcy Rules, 1870, a copy of the appeal notice of motion was within twenty-one days from the date of the order duly left with the Registrar of Appeals and entered with him, and a deposit was at the same time duly paid, but a copy of the appeal notice was not, in accordance with rule 144, sent to the Registrar of the County Court until the 12th of November, on which day a notice was sent by the Appellant to the Registrar, addressed to him, and to the bankrupt, and to the trustee acting under the bankruptcy.

Argument.

Pollard, for the Appellant.

Winslow, Q.C., and *G. Harris Lea*, for the trustee:—

The appeal is irregular and out of time.

By sect. 71 of the *Bankruptcy Act*, 1869, no appeal is to be

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entertained under the *Bankruptcy Act*, except in conformity with the rules of court for the time being in force, and rule 144 of the Bankruptcy Rules, 1870, directs that upon entering an appeal a copy of the appeal notice shall be sent "forthwith" to the Registrar of the Court appealed from, who shall "forthwith" file the same with the proceedings.

Rule 143 directs that the appeal is to be entered with the Registrar of Appeals within twenty-one days from the date of the order, and it has been held in this Court that the Chief Judge has no power, even with the consent of the parties, to hear an appeal after the twenty-one days have expired unless notice has been left with the Registrar of Appeals. That rule being imperative, there is nothing to diminish the stringency of this rule about sending the appeal notice to the Registrar of the Court appealed from. "Forthwith" cannot be satisfied by a delay of from the 22nd of August to the 12th of November. The object of the rule is that the notice may be filed with the proceedings, and thus notice given to the parties interested. As was said by the Appeal Court in *Ex parte Viney* (1), it is of no use for the Appellant to keep the appeal notice in his pocket.

Pollard, contrà:—

There is a marked difference in the terms of the two rules. Rule 143 defines the time—"within and not later than twenty-one days." Rule 144 merely says "forthwith." The latter is directory only; the former being imperative.

Upon the final clause of this rule—that, namely, which directs a notice to be served on each Respondent four days before the day on which he intends to move—there has been a decision. A notice had been served on a Respondent, on the 18th of a month, that the Court would be moved on the 21st; and it was argued by the Respondent that the right of appeal was gone; but the Lords Justices held that the appeal motion might be heard on any day after four clear days had elapsed: *In re Wood* (2).

One of the grounds of this appeal is want of jurisdiction, and to this ground a restriction as to the time of bringing an appeal does not apply: *In re Plumstead Water Company* (3).

(1) 4 Ch. D. 794. (2) Law Rep. 7 Ch. 302.
(3) 2 D. F. & J. 20.

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C. J. B. 1877 *In re* SILLENCE. *Ex parte* SILLENCE. Judgment.

BACON, C.J.:—

In my opinion the objection is fatal. I have no doubt that the notice ought to be sent to the Registrar within the twenty-one days, or as soon as possible afterwards.

There is no distinction between one rule and the other that I know of. The word "forthwith" is to be found in the second rule, it is true—and why? In order that the notice may be filed with the proceedings, and that notice of the appeal may be given to the solicitor carrying on the business of the bankruptcy. The object is that the party against whom the appeal is directed may be made aware of the appeal, and also that the proper officer may be informed, and the notice be filed.

As to the point about the jurisdiction, it is of course open to the Appellant to take this objection, but not upon this proceeding. I do not know whether this was made a ground of the order in the Court below, and I do not inquire.

[*Pollard*:—It was not.]

Then that would have been the proper course of proceeding.

I find that for purposes of universal expediency the rule directs that twenty-one days' notice of appeal shall be given to the Registrar of Appeals. Then, in order that no interval may elapse, it is ordered that notice be "forthwith" sent to the Registrar of the Court appealed from. This word "forthwith" is a most potent word, and in construing it, I think regard must be had to the interval of twenty-one days prescribed by the former rule, and that the notice must be sent either within the twenty-one days or as soon as possible afterwards.

In my opinion the objection is fatal. I cannot hear the appeal; and the application must be refused with costs.

Solicitors: *Lumley & Lumley*, agents for *George Feltham, Portsmouth; Adams, Moberly, & Shenton, Winchester.*

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INTERNATIONAL FINANCIAL SOCIETY *v.* CITY OF MOSCOW GAS COMPANY.

C. A. 1877 Dec. 10.

[1871 I. 55.]

CITY OF MOSCOW GAS COMPANY *v.* INTERNATIONAL FINANCIAL SOCIETY.

[1871 M. 198.]

Practice—Time for appealing—Refusal of Application—Dismissal of Suit at the Hearing—Suit heard under old Practice—Rules of Court, 1875, *Order* LVIII., *r.* 15—*Judicature Act*, 1873, *s.* 22—*Enlargement of Time—Bonâ fide Mistake—Order* LVII., *r.* 6.

The time for appealing from the dismissal of a suit at the hearing dates from the time of pronouncing the judgment; the word "application" in Order LVIII., rule 15, being applicable to the hearing of a suit as well as to an interlocutory proceeding.

Where a suit in Chancery was brought to an issue on replication filed and heard under the old practice, it was *held* that the appeal must be regulated by the new practice, and the bill having been dismissed, the time for appealing was calculated from the pronouncing of the decree.

The mere fact that an Appellant has misconstrued one of the rules, and by reason of such mistake has omitted to bring his appeal in time, is not a sufficient ground for enlarging the time for appeal.

Statement.

THE bill in the first of these suits was filed by the *International Financial Society, Limited*, against the *City of Moscow Gas Company, Limited*, to enforce payment of a large sum of money due from the last-named company on the security of an indenture of mortgage, dated the 16th of February, 1867, whereby the last-named company conveyed to the Plaintiffs a certain concession for supplying the streets of *Moscow* with gas, and the stock-in-trade and plant of the company. In default of payment the bill prayed for foreclosure of the mortgage.

The bill in the second suit was a cross bill filed by the *City of Moscow Gas Company*, seeking to impeach the validity of the mortgage security.

Both suits were brought to a hearing before Vice-Chancellor *Bacon* on the same day, the original suit having been set down on motion for decree and the cross suit having been brought to a

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hearing on replication filed. Both suits were at issue before the Judicature Acts came into operation.

On the 1st of April, 1876, the Vice-Chancellor made a decree in both suits, by which he dismissed the bill in the cross suit with costs to be added to the security, and made the usual foreclosure decree in the original suit.

This decree, although pronounced on the 1st of April, was not entered till the 16th of June, 1876.

The *City of Moscow Company* gave notice of appeal from the whole decree on the 29th of May, 1877, for the 15th of June.

On the 6th of June, 1877, the *International Financial Society* gave notice to the *City of Moscow Company* that they would (without prejudice to the right to insist that their appeal was not brought within the time allowed for so doing, and ought not to be entertained at all) ask that the decree of the Vice-Chancellor in the cross suit might be varied by ordering the costs in that suit to be paid by the Plaintiffs instead of being added to the Defendants' security.

Argument.

Kay, Q.C., and *Everitt*, appeared for the Appellants.

Davey, Q.C., and *Romer*, for the *International Financial Society*, took a preliminary objection :—

We object to the appeal from so much of the decree as relates to the cross suit, as being beyond the time allowed by Order LVIII., r. 15 (1). The "respective periods" mentioned in the rule apply to the period of twenty-one days limited for interlocutory applications and one year limited for all other appeals. Consequently the refusal of an application must also refer to final as well as to interlocutory appeals. Therefore the time in the present case must be calculated from the date when the decree was pronounced, not when it was entered. The fact of two separate orders being

(1) Order LVIII., r. 15, is as follows:—"No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal."

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included in one decree, one of which is refused and the other granted, makes no difference: *Cummins* v. *Herron* (1); nor the fact that the Court made an order that the costs should be added to the security: *Swindell* v. *Birmingham Syndicate* (2). With respect to the expression "application," it is a word of general meaning, and refers as well to bringing on a suit for hearing as to an application by motion. In either case the suitor "applies" for the judgment of the Court.

[BAGGALLAY, L.J., referred to Orders XVIII. and XIX.]

Kay, Q.C., and *Everitt*, for the Appellants:—

In the first place, the decree in this case was made under the old practice, as the causes were both at issue before the new Judicature Acts came into operation.

In the second place, this is not the "refusal of an application;" it was the dismissal of a bill in which issue had been joined by filing replication, and had been set down for hearing in the usual way. An "application," as the word is used in the rule, and as it is commonly understood, is made by motion or summons, and when it is refused no formal order need be drawn up at all. This is shewn from the use of the word in Orders LII., LIII., and LIV., which treat of such applications. The decision of the Court on the hearing of the cause is always called in the rules a "judgment." The reason given by Lord Justice *Mellish*, in his judgment in *Swindell* v. *Birmingham Syndicate* (3), that if the time was calculated from the drawing up the order the Appellant might delay the matter indefinitely, shews that he had special reference to an interlocutory application. It may be that the dismissal of a bill is a *casus omissus* under the Order. In that case the 23rd section of the *Judicature Act*, 1873, throws us back upon the old practice.

JAMES, L.J.:—

I am of opinion that the plain grammatical construction of this rule is in favour of the objection taken by Mr. *Davey*. It is impossible, as it seems to me, to read the word "application" in any limited sense as an application for an interlocutory order,

(1) 4 Ch. D. 787. (2) 3 Ch. D. 127. (3) 3 Ch. D. 133.

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because it is quite obvious that the rule applies to other than interlocutory orders. Now, what is the rule? "No appeal from any interlocutory order, except by special leave of the Court of Appeal, shall be brought after the expiration of twenty-one days" —that is, from an interlocutory order. "No other appeal"—that is, an appeal from a judgment or order, from a judgment, technically so called, or an order other than an interlocutory order— "No other appeal shall, except by such leave, be brought after the expiration of one year"—that is a positive direction. Then, of course, the year would be calculated from the time at which the judgment is supposed to take effect; and by the Order and by some of the former rules the judgment takes effect from the time when it was actually pronounced. That would be the natural construction if it had stopped there. But there is a further provision made as to calculating time. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected (I am paraphrasing it) except in the case of the refusal of an application, and in that case the said respective periods shall be calculated from the date of such refusal. It appears to me impossible to say that is not the plain grammatical construction of these words. That is to say, where it is necessary for any purpose, in order to enable a man to see what he is appealing from, that the judgment or order should be perfected, so that he may see exactly what is the final form which it takes, and by which he may be aggrieved, then he has a twelvemonth from that time to consider his appeal; but where the application for final judgment or order is simply refused, although refused with costs, he knows exactly the fate of his application, and then he has a twelvemonth from the time at which he knows that the order with which he is dissatisfied has been made. It appears to me that that is the meaning of the words, and is exactly within the object for which the rule is framed. You take it from the time of refusal—that is all the Appellant wants to know—you take it from the time when the order is perfected, when there may be reasonable ground for his saying, I want to see the shape in which the final order is made. In this case there was an application made to the Court—as every bill used to be drawn—praying that a certain deed might be set aside, or certain relief granted,

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and that application was refused. You must apply exactly the same meaning to this rule in cases pending before the Act which are brought into the present practice as you would to any new proceeding. It appears to me impossible to say that in an action brought now in any Division that would not be the way in which the rule would be applied. We must apply the same principle to pending suits which were brought with regard to appeals within the existing practice before this appeal was brought.

BAGGALLAY, L.J.:—

The suits in which the order was pronounced from which this appeal is brought were pending suits at the time when the Judicature Acts came into operation. Notice of motion for decree had been given in one suit, and replication had been filed in the other. Under the orders of several Judges of the Chancery Division, those suits were properly prosecuted to a hearing on the 1st of April, 1876, in accordance with the rules and practice of the Court of Chancery, as it existed prior to the passing of the *Judicature Act*. That order or decree having been pronounced on the 1st of April, 1876, the provisions of the 22nd and 23rd sections of the *Judicature Act*, 1873, clearly point out that if any appeal is brought from that order, regard must be had to the provisions of the *Judicature Act*, and the orders scheduled thereto must be had regard to. In fact, this point, though stated in the form of an argument, was hardly disputed, and it hardly could be having regard to the fact that the Appellants have themselves followed the course pointed out by the *Judicature Act*, by commencing this appeal in the way prescribed by the 2nd rule of Order LVIII.

If these rules apply, the only question which remains is, whether by the 15th rule of that Order the period of time within which this notice of motion should have been given was limited to the period of twelve months from the day on which the order bears date, or whether the twelve months should be calculated from the time when the order was perfected, which was not till June, 1876. It is admitted that if the former construction applies, the appeal is brought too late, and if the latter, it is in good time. Now, the 15th rule having pointed out that there should be a period of twenty-one days for appeal with reference to interlocutory orders,

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and a year as regards all other orders, it goes on to say from what time you are to calculate those "respective periods." The introductory words, "the said respective periods shall be calculated from the time"—stopping there for a moment—indicate that the time is being fixed as regards both periods, namely, the twenty-one days and the year. It is "to be calculated from the time at which the judgment or order is signed, entered, or perfected." That is to be the general rule as regards both, but there is an alternative, expressed as follows: "or in the case of refusal of an application, from the date of such refusal." It has been suggested that the word "application," as used in the above sentence, has a limited meaning, and that it does not include a motion for decree at the hearing. I can see no ground whatever, in the ordinary grammatical construction of the rule, to give it so limited a meaning, and certainly if we refer to other portions of the Order and the several rules under the Orders, we shall find the word "application" and the word "apply" constantly used with reference to every class of application. One need turn to no other than the title of Order LIII., which speaks of "motions and other applications," clearly implying that a motion is an application. Under these circumstances, it is impossible to hold that this appeal was presented within the time required.

Thesiger, L.J.

THESIGER, L.J.:—

I have come to the same conclusion. The words used in the rule, "refusal of an application," are certainly not very happily chosen to express the dismissal of a bill. But at the same time it seems to me that they are wide enough to include it, and that they are equally wide enough while they become appropriate to the refusal of relief applied for in a statement of claim, which is the form of procedure to which this rule is primarily applicable. That being so, I take the rule in its general intention, and I certainly should gather that it was intended by those who framed it that there should be an analogous procedure applicable to all orders and judgments, whether final or interlocutory, with this difference, that as regards interlocutory orders there was to be a period of twenty-one days for appeal, and as regards final judgments and orders a period of one year. Then I come to the clause

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of the rule upon which the contention in this case arises, and giving words their grammatical force and signification, we must apply the words "the said respective periods" to the subsequent words used, namely, "in case of the refusal of the application." And lastly, it being admitted that there are some final judgments and orders which do come within the words "in case of the refusal of the application," for that has been practically admitted, it seems to me to reasonably follow that all judgments or orders, whether final or interlocutory, should be included in those words, and consequently that an appeal against the refusal of an application of whatever sort should date from the time when the decision is given, and not from the time when an entry of that decision is made.

Argument.

Kay, Q.C., and *Everitt*:—

We now apply, under Order LVII., rule 6, for an enlargement of time to appeal. The delay has arisen from a *bonâ fide* mistake in a rule which is ambiguously expressed. The Respondents have as yet taken no steps to carry out the decree, so no harm will be done to them. On the other hand, a great hardship will be done to the Appellants.

Davey, Q.C., and *Romer*, opposed the application.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that we cannot give any time. The Respondents here say they are within the rule, and they have a right (and I think it is as valuable a right as anything which a subject has in this country) to know when they can rely upon the decree or order in their favour. The limitation of the time to appeal is a right given to the person in whose favour a Judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there has been any misleading through any conduct of the other side, as was mentioned in the analogous case of vacating inrolment, which came before Lord *Cottenham*, and afterwards before Lord *Chelmsford*, in which it was laid down that the right of the suitor was *ex debito justitiæ* to keep his inrolment of the decree if it was made in due

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time, unless in very special cases (1). For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself, and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But simply where a man says, "I looked at the order, and I *bonâ fide* came to the conclusion that I had up to a particular day, and I determined to take the last day I could," then he has taken upon himself to calculate the last day, and if he has made a mistake in calculating the last day he must abide by the consequences of that mistake. Beyond all question, in this case there was abundance of time to have brought the appeal if it was intended really and *bonâ fide* to appeal from the order as pronounced.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the Court to give that special leave which is required to extend the time.

Thesiger, L.J. THESIGER, L.J.:—

I am of the same opinion, upon the same grounds as stated by the other Lords Justices.

The appeal, so far as it related to the first suit, was ordered to stand over. It came on again on the 14th of January, and was then dismissed almost without argument, the Court being clearly of opinion that as the decree dismissing the cross bill stood, the validity of the mortgage must be taken as *res judicata*, in which case a decree for foreclosure was of course.

Solicitors: *G. M. Clements; Harrison, Beal, & Harrison.*

(1) See *Wardle* v. *Carter*, 1 My. & Cr. 283; *Wildman* v. *Lade*, 4 De G. & J. 401.

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[1875 C. 52.]

Practice—Appeal—Application for Extension of Time—Rules of Court, 1875, *Order* LVIII., *r.* 15.

A decree was made dismissing the Plaintiff's suit. The judgment was based in great measure on the interpretation of a particular statute. Fourteen months afterwards a judgment was pronounced by the Court of Appeal in another case in which a different construction was put upon the statute. Six months afterwards, being a year and eight months after the decree in the first-mentioned suit, the Plaintiff in that suit applied for leave to appeal, although the time limited for appeal by Rules of Court, 1875, Order LVIII., rule 15, had expired:—

Held, that, independently of the delay on the part of the Plaintiff after knowledge of all the circumstances, the mere fact that the Court of Appeal had come to a different opinion on a doubtful point of law, was not sufficient reason for enlarging the time for appealing, and the application was refused.

The Court will not grant an extension of the time for appealing after the time limited by the rules has elapsed, except under very special circumstances.

Statement.

THIS was an application by the Plaintiff for leave to appeal from a decree of Vice-Chancellor *Bacon*, notwithstanding that the period of twelve months limited by Rules of Court, 1875, Order LVIII., rule 15, had expired.

The bill was filed by a shareholder in the *South Wales Smelting and Colliery Company*, complaining that he had been induced to take his shares by the fraud of the Defendant *H. L. Phillips*. The principal ground for relief relied on by the Plaintiff was the omission in the prospectus to state a contract, dated the 10th of May, 1873, under which the Defendant had purchased the colliery, which he had on the 29th of May sold to the company for a much larger sum. The Vice-Chancellor held that the omission of mention of this contract did not render the prospectus fraudulent within the 38th section of the *Companies Act*, 1867, and dismissed the bill with costs (1).

This decree was pronounced on the 4th of April, 1876. The notice of the present application was given on the 15th of December, 1877.

(1) 3 Ch. D. 722.

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Sir *H. Jackson*, Q.C., and *A. G. Langley*, in support of the application:—

At the time when the decree was made there had been several decisions, especially *Gover's Case* (1), that the omission of such a contract was not fraudulent under the statute. The Plaintiff, therefore, did not think it worth while to appeal; but on the 2nd of June, 1877, the case of *Twycross* v. *Grant* (2) was decided by the Court of Appeal, on an appeal from the Common Pleas Division, in which it was laid down that a contract like the present ought to have been specified in the prospectus, and that the prospectus was therefore fraudulent. In that case Lord Chief Justice *Cockburn* (3) specially referred to the decree in the present case of *Craig* v. *Phillips*, and said, "In this judgment, for the reasons I have already detailed, taking, as I do, a different view of the effect of the statute, I am unable to concur." The report of *Twycross* v. *Grant* did not appear in the Law Reports till November last, and the Plaintiff soon afterwards gave notice of the present application. The Court has not unfrequently given leave to appeal after the proper time has expired, when there has been a subsequent decision of a Court of Appeal altering the law as it was previously understood.

[JESSEL, M.R.:—Not unless the property in question is still in Court, or in some manner under distribution.]

The cases are collected in *Buckley* on the Companies Acts (4). The *Ebbw Vale Company's Case* (5) is a good instance. In *In re Lawrence* (6) it was decided that such an application could not be made *ex parte*, but it was eventually granted by the Court, on notice being given to the other party.

Kay, Q.C., and *W. W. Karslake*, for the Defendant, were not called on.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

This is an application for leave to appeal from a final order or judgment of Vice-Chancellor *Bacon* pronounced on the 4th of

(1) 1 Ch. D. 182.
(2) 2 C. P. D. 469.
(3) Ibid. 539.
(4) 2nd Ed. p. 258.
(5) Law Rep. 5 Ch. 112.
(6) 4 Ch. D. 139.

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April, 1876, dismissing the Plaintiff's bill with costs. Nothing then remained to be done; it was a final judgment entirely disposing of the suit. No fund remained in Court, there were no accounts to be taken, the whole litigation was at an end. If the Plaintiff meant to appeal, his appeal ought to have been brought within a year; but it was not so brought. Thereupon, subject to the judicial discretion of the Court of Appeal to enlarge the time for appealing, the right of the Defendant under the judgment of the Vice-Chancellor was complete. On the 2nd of June, 1877, after the expiration of the year, the judgment of the Court of Appeal in *Twycross* v. *Grant* (1) was delivered, a judgment not agreed to by all the four Judges who constituted the Court, but by two of them only, amounting, however, to an affirmance of the decision of the Court below. The Lord Chief Justice, one of the two Judges who affirmed the decision of the Common Pleas Division, stated in the course of his judgment that in his opinion the decision of Vice-Chancellor *Bacon* in the case of *Craig* v. *Phillips* (2) was erroneous. Taking the most favourable view for the present applicant, the judgment in *Twycross* v. *Grant* only amounted to a decision that in a somewhat similar case the Court of Appeal declined to disturb the judgment of the inferior Court. But even going further, and supposing that there had been an unanimous opinion of the Court of Appeal in accordance with the view of the Lord Chief Justice, I think it would have made no difference with regard to the present application. It would only have come to this, that more than a year after the decision in *Craig* v. *Phillips* the Court of Appeal had come to a different decision on a vexed point of law. In my opinion that is not sufficient ground, in the absence of very special circumstances, to deprive a man of a judgment which has been given in his favour. I can understand a different view being taken in cases where the time limited for appeal is very short, as in appeals under the Winding-up Acts, and where accounts are still pending and the assets undistributed; in such a case a creditor whose proof had been refused might be allowed further time to appeal; but the same considerations do not apply to a case like the present. There are no special circumstances at all in this case; and it does not appear to me that the

(1) 2 C. P. D. 469. (2) 3 Ch. D. 722.

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rights of the Defendant ought to depend on the accident that this vexed point of law was differently decided after the expiration of the year allowed for appealing.

Judgment, Jessel, M.R.

That is sufficient to dispose of this application. But I think it ought also to fail on the ground of the applicant's delay in making it. The judgment in *Twycross* v. *Grant* (1) was delivered in June, 1877, after the year for appealing had already expired. That judgment was not delivered secretly or in an unimportant case. On the contrary, it was immediately reported in the public journals, and it must have been known to every member of the profession who took an interest in the subject. I cannot therefore leave out of consideration the time which elapsed between the delivery of that judgment and the present application. I do not think the Plaintiff has shewn due diligence in coming to the Court on the 15th of December, on account of a decision delivered on the 2nd of June; and of course any person who comes to ask the Court to relax the provisions of the rules in his favour, must shew great diligence, and not unnecessary delay, in doing so. I prefer, however, to rest my decision on the larger ground. The application must be refused with costs.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. In this case there are no special circumstances to induce the Court to relax the rule in the applicant's favour. I do not mean to say that the Court would not in any case where the twelve months had elapsed enlarge the time to appeal on the ground that there had been a contrary decision of a superior Court on a point of law, but there must be circumstances of a very special character. And even if there had been such special circumstances in the present case, there has been so much delay in making the application that it ought not to have been granted. The case of *Twycross* v. *Grant* was not decided hastily or secretly, but after very lengthened argument in the Court of Common Pleas, and it was argued in the Court of Appeal for six days under circumstances that must have made it notorious to the present applicant. But what was the effect of that decision? It is said that this case of *Craig* v. *Phillips* (2) was decided by the Vice-

(1) 2 C. P. D. 469. (2) 3 Ch. D. 722.

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Judgment, Baggallay, L.J.

Chancellor on the authority of *Gover's Case* (1), and that *Gover's Case* has been overruled in effect by *Twycross* v. *Grant* (2). In addition to that, it is said that *Craig* v. *Phillips* (3) was specially dissented from by the Lord Chief Justice in *Twycross* v. *Grant*. First, as to *Gover's Case*, I do not agree that it was the foundation of the Vice-Chancellor's decision in the present case, but assuming that it was, it was not overruled by the judgment in *Twycross* v. *Grant*; for in that case the Lord Chief Justice says (4): "We are referred to *Gover's Case* as in conflict with the foregoing; and as the decision in *Gover's Case* was that of a Court of Appeal, if the decision really governed the case before us, we should be bound by it. But it does nothing of the sort." He then goes on to distinguish it from the case before the Court. Therefore I think that ground is cut away from the applicant. Then as to the Chief Justice's alleged dissent, which was little more than a *dictum*, we may set against it what was said by the Divisional Court in the previous judgment in *Twycross* v. *Grant* (5). After referring to *New Sombrero Phosphate Company* v. *Erlanger* (6), Lord *Coleridge* said: "And *Craig* v. *Phillips* only decided that it is not incumbent on a mere vendor of property to a company to disclose what he gave for it. Neither of these decisions therefore, in my view, conflicts with the conclusions at which we have arrived."

Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. I think that this Court ought not lightly to interfere with the time fixed for bringing appeals, and ought to require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time. I give no opinion whether, if there were a clear decision of a Court of Appeal overruling previous decisions, this discretion ought not in some cases to be exercised. But it is not enough that doubts have been thrown on the law as previously expressed. It ought at any rate to be shewn that after the judgment from which it was desired to appeal there had been some decision of a Court of

(1) 1 Ch. D. 182.
(2) 2 C. P. D. 469.
(3) 3 Ch. D. 722.
(4) 2 C. P. D. 536.
(5) Ibid. 488.
(6) 5 Ch. D. 73.

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higher jurisdiction, by which the law which had been previously unsettled had been entirely settled. But after the judgment of the Court of Appeal in *Twycross* v. *Grant* (1), the law is as much unsettled as before. The applicant relies on *Twycross* v. *Grant* as shewing, first, that *Gover's Case* (2) settled the law as applicable to the present case; and, secondly, that it has been overruled. But in the first place *Gover's Case* did not settle the law. The Vice-Chancellor in deciding the present case did not altogether rest his decision on *Gover's Case;* and indeed, in the argument before the Court of Common Pleas, each of the parties relied on *Gover's Case* in support of their respective contentions. And in the second place, if the overruling of *Gover's Case* is to be relied on, I must observe that in the judgment of the Divisional Court (3) Lord *Coleridge* draws attention to the fact that in *Gover's Case* Lords Justices *James* and *Bramwell* "put upon the Act a construction much narrower than that put upon it by the Court of Queen's Bench in *Charlton* v. *Hay* (4) and *Cornell* v. *Hay* (5), and narrower than that which we have endeavoured to shew is its true construction." That judgment was delivered on the 12th of February, and therefore the Appellant had then ample notice that *Gover's Case* had been questioned as a conclusive authority.

I may add that if the effect of the decision in *Twycross* v. *Grant* had been much stronger than I take it to be, and if it should be shewn that *Gover's Case* had been overruled by it, I do not think it would have been a special circumstance sufficient to justify the Court in granting this application.

Solicitors: *Hughes, Hooker, Buttanshaw, & Murton; A. Kerly.*

(1) 2 C. P. D. 469.
(2) 1 Ch. D. 182.
(3) 2 C. P. D. 487.
(4) 31 L. T. 437.
(5) Law Rep. 8 C. P. 328.

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LUCENA *v.* LUCENA.

C. A.
1876
M. R.
Dec. 2.
C. A.
1877
July 23, 24;
Nov. 26.

Will—Construction—Surviving Children—"Surviving" read "Other"—Settled and unsettled Shares—Children surviving by Stocks.

A testator gave his residuary estate to trustees in trust for all his children equally, and directed that the shares of his sons should be paid to them at the age of twenty-five, and that the shares of daughters should be settled in trust for them for life for their separate use, and after their death in trust for the issue of such as should leave issue; and in case of the death of any of his sons before attaining twenty-five, or of any of his daughters without issue, or having issue, all such issue should die, being sons before twenty-five or daughters before twenty-one or marriage, the share or shares of him or them so dying should go in equal shares to the testator's "surviving children" in the same manner as the original shares.

The testator left three sons, all of whom attained twenty-five, and three daughters, all of whom married.

On the death without issue of one of the daughters whose share was to be distributed, one brother was still alive, and two brothers and two sisters were dead, and both of these sisters had left issue still living:—

Held, by *Jessel*, M.R., that surviving children meant those who were surviving either personally, or, in the case of the daughters whose shares were settled, by their stocks; and that the surviving brother and the issue of the two deceased sisters were entitled to the fund.

But *held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that "surviving" meant "other," and that the fund was divisible in fifths among all the brothers and sisters of the deceased daughter.

Statement.

THIS was a petition in a suit instituted in the year 1818 for the administration of the estate of *John Charles Lucena*.

By his will, dated the 12th of August, 1812, *John Charles Lucena*, after giving certain specific bequests and annuities, devised and bequeathed all the residue of his estate and effects unto his executors upon trust for his several children, namely, the Plaintiff *James Lancaster Lucena*, the Defendant *John Charles Lucena*, the Defendant *Mary Clara Barnewall* (then *Mary Clara Lucena*), the Defendant *Joanna Harriet Inglis* (then *Joanna Harriet Lucena*), the Defendant *Stephen Lancaster Lucena*, and the Defendant *Clara Eliza Cutlar* (then *Clara Eliza Lucena*), all since deceased, and to any other child or children he might thereafter have, equally, share and share alike; and the said testator directed that his executors should apply the income of his residuary estate towards the maintenance and education of his chil-

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dren during their respective minorities, and should accumulate the surplus income for the use and benefit of his said children, so that each should enjoy an equal share of his property and of the annual produce thereof; and he directed that the shares of such of his sons as should conduct themselves with propriety to the satisfaction of his executors should be paid or transferred to them at the age of twenty-five years; but in case the conduct of any of his said sons should not be satisfactory to his said executors, the share of such son should remain vested in the executors, and should be held in trust for such son for life, and after his death for his children, to be payable to sons at the age of twenty-five, and to daughters at the age of twenty-one or marriage. With respect to the shares of his daughters, the testator directed that the same should remain vested in the executors upon the trusts following; that is to say, in trust to pay the annual income of their respective shares to his daughters during their life for their separate use, and after their death in trust as to the shares of such of his daughters as should die leaving issue, for such issue, share and share alike, to be paid and transferred to such issue, being sons, at the age of twenty-five, and being daughters, at the age of twenty-one or marriage. And the testator then proceeded as follows:—"And in case of the death of my said daughters or of any of my sons before they shall have attained their respective ages of twenty-five years, or of such of them as shall not have received his or their share or respective shares of and in the residue of my said estate for the reasons aforesaid, without lawful issue, or having such, and they shall all happen to die, being a son or sons before he or they shall have attained the age of twenty-five years, or being a daughter or daughters before the age of twenty-one years or marriage, then and in such case I do hereby will and direct that the share or respective shares of him, her, or them so dying shall go to and be divided equally between my surviving children, and be paid to them or applied to their respective uses in such manner as his or their original shares are hereby directed to be paid and applied, or remain vested for his, her, or their separate uses in my said executors, according to the true intent and meaning of this my will. And in case of the death of all my said children without issue, or leaving such, and they shall happen to die under the

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aforesaid age, and before they shall have received their respective shares of and in the residue of my said estate, then in trust that my said executors do and shall stand possessed of the said residue of my estate, one-third for the use and benefit of my wife *Mary Ann Lucena*, as to one other third part thereof in trust for my sister *Joanna Lucena*, and as to the remaining third part thereof in trust for all and every the children of my cousin *Clara Kettle*, equally share and share alike." And the said testator declared that in case of his daughters or any of them marrying with the approbation of his executors, and the person or persons with whom they might happen to marry should be willing to make a suitable settlement upon his said daughters or any of them, in such case the testator authorized his said executors to advance and pay down, upon such settlement being duly executed, so much of the respective shares of his said daughters as they should think proper, or to settle the same upon such other trusts as they should consider to be most for the advantage and benefit of his said daughters respectively, so that provision might be made for them to the full extent of their fortune in case of their surviving their respective husbands, and to their lawful issue after the death of their parents.

The testator made a codicil to his will, dated the 23rd of April, 1813, and thereby directed that the sum of £10,000 should be set apart in the names of his executors for the benefit of his eldest son, *James Lancaster Lucena*, during his life, and afterwards for his lawful issue; but in case of his death without such lawful issue (which event happened), then and in such case he directed that the said principal sum of £10,000, the accumulations of income, should revert and become part of and go along with the residue of his said estate, and be divided amongst "the rest of his children" in such manner as directed by his said will as to such residue, anything thereinbefore or in his said will contained to the contrary notwithstanding.

The testator left six children, namely, those named in his will, all of whom attained the age of twenty-five years.

In the year 1828 *Joanna Harriet* married *Charles Inglis*, and on her marriage her sixth share was carried to a separate account in the suit.

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Statement.

She died on the 9th of May, 1876, without issue, and the present petition was presented for the payment of her share to the persons entitled thereto.

Clara Eliza Cutlar died in July, 1871, leaving issue who were still living.

Mary Clara Barnewall died in May, 1872, also leaving issue who were still living.

James Lancaster Lucena died in December, 1866, a bachelor.

John Charles Lucena died in February, 1868, leaving issue who were living at his death.

Stephen Lancaster Lucena survived Mrs. *Inglis*, and died in June, 1876.

No objection was made to the conduct of either of the sons.

The Petitioner, *Gerald Surman*, was the legal personal representative of the two brothers of Mrs. *Inglis* who died in her lifetime, namely, *James Lancaster Lucena* and *John Charles Lucena*, and he prayed that the fund might be divided into fifths, and that he might be declared entitled to two of those fifths.

The petition came on to be heard before the Master of the Rolls on the 2nd of December, 1876.

Argument.

Fischer, Q.C., and *Rawlinson*, for the Petitioners, contended that, according to the true construction of the will, "surviving children" meant "other children," and that consequently the funds were divisible in fifths, of which two fifths belonged to the Petitioners.

Cookson, Q.C., and *Caldecott*, *Davey*, Q.C., and *North*, for the issue of the two deceased sisters, contended that "surviving children" meant children surviving either by themselves or by their issue, and that the funds were therefore divisible in thirds: *Doe* v. *Wainewright* (1); *In re Tharp's Estate* (2); *Badger* v. *Gregory* (3); *Waite* v. *Littlewood* (4); *Wake* v. *Varah* (5).

Chitty, Q.C., and *Smart*, for *Stephen L. Lucena*, the brother of Mrs. *Inglis* who survived her, submitted that "surviving" should

(1) 5 T. R. 427.
(2) 1 D. J. & S. 453.
(3) Law Rep. 8 Eq. 78.
(4) Ibid. 8 Ch. 70.
(5) 2 Ch. D. 348.

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be read literally, and therefore that the surviving brother took the whole: *Turner* v. *Frampton* (1); *Maden* v. *Taylor* (2).

Roxburgh, Q.C., and *Romer*, for Mrs. *Inglis's* legal personal representative.

[JESSEL, M.R., referred to *Ingram* v. *Soutten* (3) and *Hawkins* on Wills (4).]

Fischer, in reply.

JESSEL, M.R.:— Judgment, M.R.

I am rather surprised to find a new case on the words "survivor or survivors." As far as I am aware, and as far as counsel at the Bar have been able to discover, it is a new case. The novelty consists in this, that among the reported cases there are only two classes—a first class of cases where the original gift was to the children absolutely unsettled, and a gift over on the death of any one under a given age; and the second class of cases where the shares of the children were settled upon them for life, with remainder to their children or more remote issue, with a gift over upon their death, and on the failure of such children or more remote issue, over to the survivors. But this belongs to a third class of cases, because some of the shares are settled upon the children, that is, the shares of the daughters, and in one event the shares of the sons, are given to them for life, with remainder to their children, while other shares, that is, the shares of those sons whose shares are not settled, are given to them absolutely; and then, in the event of any of the absolute owners not having attained twenty-five, or in the event of any of the tenants for life dying without children or remoter issue, or on failure of such issue, the share of the child so dying is to go over to the surviving children. Consequently it is a mixed case, so to speak, there being both sorts of gifts as regards the children or remoter issue.

Now, the first question I have to consider is, whether the rules which have been established as regards settled shares, that is, where the whole of the children's shares are settled so as to be

(1) 2 Coll. 331.
(2) 45 L. J. (Ch.) 569.
(3) Law Rep. 7 H. L. 408.
(4) Page 202.

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divided among stocks, apply to the case where some only are settled and some only given absolutely. That is the first question I have to consider. The second thing I have to consider, supposing those rules do apply or ought to apply, is, what is the meaning of them.

Now as regards the first point, it does appear to me that the whole of the reasoning on which the rules are founded in the case of the children's shares being settled applies to the case where some only of the children's shares are so settled. The reasoning of the rule, as it appears to me, is this, that it is absurd to suppose that a testator would give over the share of a child dying without issue to children who survived that child, when the fact of the survivorship makes no difference to the stock: a tenant for life must die at some time or other, and then, when the tenant for life is dead, the children or remoter issue take, and therefore the right of the stock is wholly independent of the parent or tenant for life surviving or not a given period. Where a testator has intended to settle the fund among his children and his descendants according to a class, it would certainly be a most extraordinary notion to attribute to him an intention that the mere fact of a parent who only takes a life interest surviving a given period is to determine the title of the descendants to succeed. That, no doubt, makes a very strong view of the case to take as against the literal interpretation; that is to say, you must not take a manifestly absurd view, leading to manifestly absurd consequences, if you can by possibility avoid it.

Then comes another rule, and that is, that you must not capriciously interfere with the ordinary meaning of the words, and further, that if you do interfere with the ordinary meaning, you must interfere as little as possible. Of course it is not capricious to interfere in the case put of a settlement, because you make that a rational result which would otherwise be altogether absurd and irrational; and it seems to me that that has been the governing principle in all cases. But then there is a second reason here, which is given by Lord *Selborne*, when Lord Chancellor, in *Waite* v. *Littlewood* (1), and which has been approved of and followed by the Court of Appeal in Chancery in the case of *Wake* v.

(1) Law Rep. 8 Ch. 70.

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Varah (1), and that is this, that the testator means that where there is a failure of a particular stock the shares of that stock shall be included in the others and go in the same manner as the original share. That is so, according to the reasoning I have already stated. But then he says: "I do not say that 'survivors' should be read as 'others.'" What he means is that you should not turn it into "others," but that there is a kind of survivorship, and the way he puts it is this. He says (2), "It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention." In other words, what he means is this, that there is a kind of survivorship of the stock which is to take, and that you need not read the word "survivor" as meaning simply "other," but that you will take "surviving child" to mean "surviving descendant." In other words, you may take "surviving child" to mean a child who shall, either actually himself or herself, survive, or in respect of whom there shall be survivorship by reason of a member of the stock descended from that child being alive at the time when the gift vests. It is a modified survivorship. It is not a survivorship, strictly speaking, to the child alone, but a survivorship of the stock of which the child is a descendant; and in that sense, as I understand Lord *Selborne* to mean, you do attribute the meaning of "survivor" to "surviving," and you rather alter the meaning of the words "surviving child"; or if it is "survivor," you alter the word to a certain extent by making it "survivor of the stock." That I understand is what his Lordship means to express; and that, if I understand him rightly, is, I think, shewn by an observation of Lord Justice *James* in *Wake* v. *Varah*, where he says (3): "Whether there ever was in the earlier cases a too lax interpretation of the word 'survivor' is, in my opinion, a matter of no consequence. A whole category of cases has now settled that 'survivor' may be read 'other,' or 'surviving stirps,' and has

(1) 2 Ch. D. 348. (2) Law Rep. 8 Ch. 74.
(3) 2 Ch. D. 358.

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settled, with reasonable clearness, under what circumstances it may be so read; and no plain man not a lawyer would have had the slightest doubt in any of those cases that the real intention of the testator was effectuated thereby." The learned Judge has a more confident opinion of what is right and wrong in obscure wills than I have ever been able to entertain. In the first place, it must be recollected that these wills are drawn by lawyers for the testators. They do not, in fact, express the real intentions of the testators, and what the law does is to find out what was most probably their intention. That is the rule, as I understand it, that you may take "surviving child" or "survivor" as referring to surviving stock. As I said before, there is no less reason for applying the rule to the case of those taking absolutely than to those taking as surviving stock. You may apply the rule with the same facility, because the "stock" is limited in the case of a man taking absolutely. In other words, some other members of the stock may survive, and in that way you may reconcile the rule by the light thrown on it in the case I have referred to. I think that must be considered to be the governing rule in this case, unless I can find some other intention disclosed by the words of the will itself.

Now this will is very peculiar, and, like all these obscure instruments, leaves some case unprovided for, and leaves some case which may be as absurd as any which could be imagined; and it is impossible to say that something or other might not happen which would bring forth a result not contemplated by anybody. But still one must not forget, in the first place, that in this will the word "surviving" is very frequently used in the proper sense, and the word "other" is used in respect of these children in its proper sense—an observation which perhaps is not of great weight, but at all events of some weight. Then we have this. There is a gift over in respect of some of the shares. How are the shares settled? They are settled in this way. The daughters take for life, with remainder to their children, &c. The sons take absolutely if they attain twenty-five years of age and conduct themselves well, but if they attain twenty-five years of age and do not conduct themselves well (that is, in the opinion of the trustees), then the shares are settled on the sons for life, with remainder to

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their children; and then there is a gift over, which is not as carefully worded as it might be, and which I take to mean this: that if any daughter dies without leaving any child, or without leaving any issue who is entitled to take, and if any son dies under twenty-five before he becomes absolutely entitled, or if not absolutely entitled, then, if he dies without issue, or without their becoming entitled to take, the share is given over. As I have said before, it is not a grammatical sentence. It has given rise to an argument on the part of Mr. *Roxburgh*, which I shall deal with presently more in detail, but that is the meaning I put upon it. If that is so, to whom is the share to go? It is "to go and be divided equally between my surviving children, and be paid to them or applied to their respective uses in such manner as his or their original shares are hereby directed to be paid and applied, or remain vested for his, her, or their separate uses in my said executors, according to the true intent and meaning of this my will." So that it is to be paid to them or applied "to their respective use in such manner," &c. There, again, the language used is not accurate; the word "their" would refer to the children, and if it were applied to the respective use of their original shares you would have to stop; but the words mean that the settled shares are to be applied in the same way as the original shares, so as to carry it to the use of the daughters, and I cannot possibly read the word "their" in that sentence as restricted to the children only, and I decline to read it so. I therefore read the word "children" as regards the settled shares as used to denote the representatives of the stock, and consequently there is no violence done to the words, if I am entitled so to read it, in construing the words "my surviving children" as meaning any one claiming under those children or their shares under the settlement; in other words, to read it as "surviving stock." If I read it in that way it comes to this, that the shares go to any of the children who actually survive, and that you take "surviving" to mean "surviving stock" in the case of the children being sons or daughters whose shares are to be settled; but in the case of those to be paid, they are to be paid when the sons actually survive. In that way a surviving son takes if he survives, but there is no room for a son dying before the time. I have given my meaning to the word "surviving"

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without at all changing it, although I have before me a class who are entitled to take under the word "children."

But then it is said that a son who dies after having attained twenty-five is absolutely entitled; but the difficulty I have in acceding to that argument is this. First of all, I cannot find any room for it without altering the word "surviving." He does not survive in any sense. In the next place, I cannot find room for it without reading "surviving" as "other" all through, which would have this result, that if there were two sons who died before attaining twenty-five, though the first son's share was given over, his legal personal representatives would take a share of the next son's share: that would be a remarkable result to attribute to any testator. The remark, no doubt, may be made that he did not think of such a thing. But then it is said that is not the construction of the gift over. Now, I must say that the gift over is very obscure indeed. I cannot read it literally, as I am pressed to do. "And in case of the death of all my said children without issue, or leaving such, and they shall all happen to die under the aforesaid age, and before they shall have received their respective shares of and in the residue of my said estate,"—then over. What is the meaning of that? It would be an extraordinary meaning to place upon those words to say, that although the gift over is only to take effect as to some children of the children who shall die before they shall have received their shares, yet it is to take effect as to the children themselves, that is to say, that the son who has attained twenty-five and has received his share should lose it under this gift over, because that would be the effect, if I read it literally. "Before they shall have received their respective shares," read literally, refers, not to the sons, but to the issue. There is another way of reading it, and that is, to refer those words to the sons themselves. That is contrary to the grammar and absurd, and that would be to make the gift useless in the case of the death of all the children without issue who had not received their shares, and in the case of a son who attained twenty-five, his share would not go over. I am satisfied it did not go over on the construction of this will, and that it is only to go over in the case of his dying under twenty-five without issue; but that is, I must say, a very odd construction, because it is to go

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over, as I read it, if he dies under twenty-five, under the first gift. It is as if he had said, "In the case of the death of all my sons and daughters, or in case they shall not attain the age of twenty-five;" and then the only gift over as regards their issue seems to be in the case of the sons dying without issue altogether. As I have not to construe this gift over it is unnecessary to find out what it really does mean. It is so difficult to construe, that I am satisfied by merely referring to it that it cannot be used for the purpose of assisting me in the construction of that portion of the will which alone I have to consider. That, I think, disposes of the arguments on the words of the will.

Then the only other argument presented to me was, that there was a general scheme in the will that the children should take the accrued shares, as they are called, in the same way as their original shares. I agree that there is a scheme that the accrued shares should go in the same manner, but I cannot find that that throws any light on what is the event on which the accruer is to take effect.

It seems to me that the only thing I have to decide upon is the meaning of the word "surviving." I am not at liberty to reject it, although I may modify its signification, and therefore that observation does not appear to me to be maintainable. Upon the whole, I think the conclusion I have already stated is the right one, at least so far as my opinion goes.

Then there were two other claimants whose claims have to be considered. First of all there is the legal personal representative of the daughter who died. The daughter who died took for life with remainder to her children under the gift over; and I should say that the remainder of the argument on this part of the case, as was urged and truly urged by the learned counsel, was rendered necessary by the very peculiar frame of this will, and that it was meant to be the share which was first given absolutely and then afterwards settled. But then the will goes on: "And in case of the death of my said daughters or of any of my sons before they shall have attained their respective ages of twenty-five years, or of such of them as shall not have received his or their share or respective shares of and in the residue of my said estate for the reasons aforesaid, without lawful issue," &c. There is no gift over

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except they (that is, the daughters) shall die under twenty-five and without issue. But I cannot read it in that way. When you look at the previous provision of the will which I have referred to, it is plain that twenty-five only applies to the sons, and that the words "such of them as shall not have received their shares" apply to the sons, and then the words "without lawful issue" apply to both sons and daughters. The grammar is open to all sorts of observations, but it is a contingency as to the daughters, and you have your choice; it is either death without issue, or death under twenty-five without issue, as I said before, in the case of sons. The matter is very obscure, and cannot in any view be said to be clear.

Then the only other argument was one raised on the part of the surviving son. It appears that one son survived, and it was said that, being the only surviving child, he would take the whole. Now, the first observation to be made upon it is this, that he does not claim under the original words. It is not a gift to a "surviving child," and the man who alleges that I am to read a will literally can hardly say I am to import something which is not there. The gift is merely "to my surviving children." I agree that there are cases where by the context it has been shewn that "surviving children" may include a "surviving child," and I am not going to deny that, having regard to the context here, if there had been no stock remaining this son might not be entitled; but I think it is only right to say that it is only by the context that he can claim, and therefore he who alleges that I am to read the words literally is actually driven to a context to make out his claim under the word "survivor." But my conclusion, I am bound to say, would be the same if I found the words "surviving children or child," because I have already explained I think it means not the mere survivorship of the child, but of any of the stock. Therefore I should have arrived at the same conclusion quite independently of the fact that the literal meaning would not assist the claimant; but, taking the whole context together, I come to the conclusion which I have stated. The result is that the fund is divisible into thirds.

C. A. From this decision the Petitioners appealed. The appeal came on to be heard on the 23rd of July, 1877.

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Fischer, Q.C., and *Rawlinson*, for the legal personal representatives of the deceased brothers:—

The fund is divisible in fifths, "survivors" being read "others" by force of the gift over: *Wilmot* v. *Wilmot* (1); *Holland* v. *Allsop* (2); *In re Keep's Will* (3); *In re Tharp's Estate* (4); *In re Jackson's Trusts* (5); *Hurry* v. *Morgan* (6); *Badger* v. *Gregory* (7); *Waite* v. *Littlewood* (8); *Wake* v. *Varah* (9).

Roxburgh, Q.C., and *Romer*, for the representative of Mrs. *Inglis*:—

We say the share has not gone over at all. The shares are given over on death under twenty-five without issue, and Mrs. *Inglis* had attained twenty-five.

[JAMES, L.J.:—In gifts over reference must be had to the original gift, and I am of opinion that the attaining twenty-five only applies to sons.]

Cookson, Q.C., and *Caldecott*, *Davey*, Q.C., and *North*, for the issue of the other sisters:—

We say that the division should be in thirds, those children only being designated who survived by themselves or their issue. It is a survivorship by *stirpes*: *Holland* v. *Allsop*; *In re Keep's Will*; *Waite* v. *Littlewood*; *Wake* v. *Varah*. The decision in *In re Jackson's Trusts* went on a misconception of the English authorities, and it is the only case where "survivors" has been taken to mean simply "others" in the case of absolute gifts except *Wilmot* v. *Wilmot*, in which there were other words favouring the conclusion arrived at.

Smart (*Chitty*, Q.C., with him), for *Stephen Lancaster Lucena*:—

This brother having survived Mrs. *Inglis* is entitled to the whole of the fund. "Surviving" must be read literally: *Badger*

(1) 8 Ves. 10.
(2) 29 Beav. 498.
(3) 32 Beav. 122.
(4) 1 D. J. & S. 453.
(5) 1 Ir. Ch. 472.
(6) Law Rep. 3 Eq. 152.
(7) Ibid. 8 Eq. 78.
(8) Ibid. 8 Ch. 70.
(9) 2 Ch. D. 348.

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v. *Gregory* (1); *Waite* v. *Littlewood* (2); *Wake* v. *Varah* (3); *Turner* v. *Frampton* (4); *Leeming* v. *Sherrat* (5).

Fischer, in reply.

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Nov. 26, 1877. COTTON, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Cotton*, L.JJ.).

After reading the principal clauses of the will, his Lordship continued:—

All the six children of the testator named in his will survived him. The three sons all attained twenty-five, and the provision as to settlement of sons' shares never came into operation. The question arises as to the share settled on Mrs. *Inglis*, one of the daughters, and her children. She died on the 9th of May, 1876, without having had any children. At the time of her death one brother was still living, one brother was dead, never having had any children, another brother was dead, but had left issue. Both the sisters of Mrs. *Inglis* died before her, leaving issue who were entitled under the will. The Master of the Rolls decided that Mrs. *Inglis's* share belongs in thirds to her brother living at her death and to the issue of her deceased sisters. Against this decision the representatives of the other two brothers appeal.

The event on which the gift to surviving children is to take effect is by no means clearly expressed, but we are of opinion that the Master of the Rolls has put a right construction on this part of the will, and that the gift to surviving children, whoever may be entitled under that gift, is to take effect as to the share of any daughter who dies without leaving any child or without leaving any issue entitled to take; and as regards the share of any son absolutely entitled on attaining twenty-five, if he dies before he attains that age and becomes absolutely entitled, or if the direction as to a settlement of his share has come into operation if such son dies without issue. But who are entitled to take under the gift to surviving children? The Master of the Rolls has decided that the surviving children are those who survive actually in

(1) Law Rep. 8 Eq. 78.
(2) Ibid. 8 Ch. 70.
(3) 2 Ch. D. 348.
(4) 2 Coll. 331.
(5) 2 Hare, 14.

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person or figuratively in issue taking an interest under the will, and he so construed the words to the exclusion of a son who was dead leaving issue who take no interest under the will. The peculiarity of the case which the Master of the Rolls treated as raising a new point is, that the original shares of some of the testator's children were by the will settled and others were given absolutely. There is no authority in such a case for attributing to the words "surviving children" the construction which the Master of the Rolls has given to these words. It is true that Lord *Selborne*, in *Waite* v. *Littlewood* (1), expressed an opinion against construing "survivors" simply "others," and also expressed an opinion that some idea of survivorship must be supposed to exist in the minds of testators when they used the word "survivor." But the form of the gift in that case was very different from that in the present case; there the gift was to his, the testator's, surviving daughters for life, and after their deaths to their children, and probably Lord *Selborne* is in his judgment rather referring to what he thought might have been an idea floating in the testator's mind than laying down a rule that in a case like the present, where some shares are settled and others are not, the word "survivors" is to receive a construction which gives it the effect attributed to it by the order of the Master of the Rolls. Some expressions in the judgment in *Doe* v. *Wainewright* (2) may also be referred to as supporting the Master of the Rolls' construction. But in that case the limitation to those surviving in person or in issue was referred to as to the effect of the cross-remainders implied in that case rather than as the construction of the words used. In this case the shares of sons who conducted themselves with propriety are indefeasibly vested at twenty-five, and in our opinion on this will it would be more reasonable to say that the idea in the testator's mind as regards sons in using the word "survivors" had reference to those who survived the period when their shares became indefeasibly vested than to attribute to the word a construction which would give to the children of a son who did not conduct himself with propriety an interest under the gift to surviving children, while it gives no interest to a deceased son who had conducted himself with propriety. The fact of shares being settled, and the

(1) Law Rep. 8 Ch. 74. (2) 5 T. R. 427.

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fact of the ultimate gift over being only to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as shewing that "survivors" is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift over standing as it does, there had been no settlement of the daughters' shares, we are of opinion that the word "surviving" would not have received its strict construction, and must have been construed "other"; and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word "surviving," as a matter of construction, the meaning of "survivors" in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the shares of all the children, and not of some only, had been settled.

We are of opinion that the decision of the Master of the Rolls was correct so far as he held that "surviving" could not receive its strict construction, but that he was wrong in attributing to this word the meaning which he has given to it. We think "surviving" must be construed "other," and that the personal representatives of the two sons who died before Mr. *Inglis* are entitled to share in the fund in question, which must be divided into fifths, and not into thirds.

Solicitors: *T. Frame; Dimond & Son; Paterson, Snow, & Burney; Quekett; W. Eley*, agent for *J. R. Rignall, Enfield.*

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GERMAN *v.* CHAPMAN.

C. A.
1877
V.-C. B.
July 8.
C. A.
Nov. 27, 30.

[1877 G. 112.]

Injunction—Breach of Covenant—Use of Land restricted to Purposes of Private Residence—Charitable Institution.

The erection of a building, to be used for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions, *held* to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."

Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance.

Roper v. *Williams* (1) distinguished.

The decision of *Bacon*, V.C., reversed.

Statement.

MOTION to restrain an alleged breach of covenant against the erection of any house or building to be used or occupied otherwise than as a private residence, by the proposed erection of a house where 100 girls were to be boarded, lodged, and educated in connection with a charitable institution for the daughters of missionaries.

In 1869 the Plaintiff and *W. J. Thompson*, as trustees on behalf of themselves and others, purchased fifty-seven acres of land near *Sevenoaks*, with a view to re-selling it for building purposes.

In May, 1872, the Plaintiff and *Thompson* sold to the Defendant *Chapman* four acres of the property, and by a deed of even date with the purchase deed, *Chapman*, in pursuance of his contract, covenanted with the vendors, as trustees for the owners of the estate, that he, *Chapman*, his heirs and assigns, "will not at any time erect or build or suffer to be erected or built upon the land purchased by him more than four messuages or dwelling-houses, and also that no messuage, dwelling-house, or other building so to be erected or built upon the same land shall at any time here-

(1) T. & R. 18.

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C. A. 1877 GERMAN v. CHAPMAN. Statement.

after be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."

The remaining plots of land were sold subject to similar restrictive covenants, and one of these plots adjoining that sold to *Chapman* was purchased by the Plaintiff *German*, who had built upon it a large house as a residence for himself.

In February, 1877, *Chapman* contracted with the trustees of the *Institution for the Education of Daughters of Missionaries*, which was established at *Walthamstow*, and supported by voluntary contributions, for the sale to them of his four-acre plot, the sale being stated to be "subject to certain restrictive covenants as to buildings."

In purchasing this four-acre plot the committee of the institution intended to erect upon it a large building capable of holding 100 girls, daughters of missionaries, who were to be boarded, lodged, and educated.

This proposed erection was opposed by the Plaintiff, and the owners of adjoining plots, on the ground that it would be a violation of the covenant contained in the deed of May, 1872, and also would materially interfere with the privacy and enjoyment of their land.

On the 15th of May, 1877, the Plaintiff commenced an action against *Chapman*, the trustees of the institution, and *Thompson*, to restrain them from building or permitting to be built on the four-acre plot any building intended, or adapted only for use and occupation as a school or institution, or otherwise than as a private residence, and from doing any other act in contravention of *Chapman's* covenant contained in the deed of May, 1872.

On the 8th of July an injunction was moved for before Vice-Chancellor *Bacon*, and the motion was by consent treated as the trial of the action.

Evidence was adduced on behalf of the Defendants for the purpose of shewing that the Plaintiff had verbally assented to the erection of the school before the committee had entered into their contract, but in the opinion of his Lordship this contention failed.

It was also elicited in the cross-examination of the Plaintiff that the vendors had recently given permission to a purchaser to open a boarding school for boys on the estate, near the boundary of the

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property, which was capable of accommodating about eighteen boys.

Sir *H. Jackson*, Q.C., and *E. Thurstan Holland*, for the Plaintiff, cited *Kemp* v. *Sober* (1); *Johnstone* v. *Hall* (2).

Rigby, for the Defendants *Chapman* and *Thompson*, and *Horton Smith*, Q.C., and *Whitehorne*, for the trustees of the school, were not called upon.

Judgment. V.-C. B.

BACON, V.C.:—

In my opinion the Plaintiff makes no case which entitles him to the interference of the Court. The restriction contained in the covenant is against using any part of the premises otherwise than as and for a private residence only, and not for any purpose of trade. I cannot conceive that there ought to be or is any doubt about the meaning of those words. The second branch of the proposition, "not for any purpose of trade," seems to be introduced only for the purpose of explaining what a private residence is. The real restriction is against occupying the premises for any other purpose than a private residence, and if it is intended by the Defendants to occupy this land for any other purpose than a private residence, I am of opinion the Plaintiff would be entitled to restrain them. But I am of opinion that there is no pretence for saying that this institution which is to be removed from *Walthamstow* to *Sevenoaks* is any other than a private residence, or ever will be anything other than a private residence. It is an institution in which charitable donors put themselves *in loco parentis* to the children they are to educate. They buy and build a house for these children as their children, and for their private residence this land and this house are dedicated. What is there against the covenant in this case? There is no trade as there was in *Kemp* v. *Sober* and in *Johnstone* v. *Hall*. There is no emolument derived from it. On the contrary, the gentlemen dispose of their own charitable donations for the benevolent purpose mentioned, and is it to be said that this is not a private residence? What is it if it is not? What gives it any character of publicity? Children are received here;

(1) 1 Sim. (N.S.) 517. (2) 2 K. & J. 414.

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C. A. 1877 GERMAN v. CHAPMAN. Judgment, V.-C. B.

it is said they may amount to a hundred. What can that signify? What can it signify if a medical practitioner says that diseases are likely to break out in houses in which there may be a hundred children. So they are in houses where there are only two children, or only one. That does not affect the question in the slightest degree; it cannot be disputed that if the Defendants in this action had a hundred children of their own, which is not likely to happen in this country where polygamy does not exist, that they would not be able to build a house for their children, and what does it signify if it is partly for them to receive education and instruction. If in the tumults that disturb the world now some Turkish Pacha transported himself and his seraglio, and his hundred children to this country, and built a house for their private residence, could it be said it was an infringement of the covenant? It may be said this is an absurd illustration, but it is necessary sometimes to resort to absurd illustrations when a man says that his expectations are disappointed, and what he contracted for is withheld from him or taken away from him by the public character of this school. There is no ground whatever for his statement. I must say, however, that I see with great dissatisfaction the manner in which this case has been met. An attempt to establish an assent on the part of the Plaintiff is put forward. In my opinion no assent has been given which binds the Plaintiff. I must refuse this application, and I must refuse it with costs, because I think it is unfounded; but I must at the same time order that the Plaintiff shall not pay the costs which have been occasioned by the affidavits filed by the Defendants. On the facts alleged by the Plaintiff there never was any dispute between the parties which could properly affect the decision of the Court. The action will therefore be dismissed with costs.

C. A.

From this decision the Plaintiff appealed. The appeal was heard on the 27th of November, 1877.

Argument.

Sir *H. Jackson*, Q.C., and *E. Thurstan Holland*, for the Appellant:—

This building is to be used for the purposes of a public charity supported by voluntary contributions, and cannot come within the

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description of a private residence: *Doe* v. *Keeling* (1); *Kemp* v. *Sober* (2); *Johnstone* v. *Hall* (3). The only residents will be a matron and teachers who earn their living by the discharge of their duties on the spot. A private residence means the residence of a family. This is not the residence of a family, but a public establishment. To use negative words, "not for purposes of trade," would not have been sufficient, such words would not prevent the erection of a private lunatic asylum: *Doe* v. *Bird* (4). In *Wickenden* v. *Webster* (5) a covenant similar to the present was held to prohibit the use of a building as a school. The principle of these cases was acknowledged in *Johnstone* v. *Hall*, and the bill in that case was only dismissed because the Plaintiffs claimed as reversioners.

Freeling (*amicus curiæ*) said that in that case the relief prayed was subsequently given, when a bill for that purpose was filed by the tenant in possession.

Rigby, for *Chapman* and *Thompson*, took no part in the argument.

Horton Smith, Q.C., and *Whitehorne*, for the trustees of the school:—

One of the covenantees refuses to concur.

[JAMES, L.J.:—That is of no consequence. If either of them wishes to have the benefit of the covenant he is entitled to it.]

Then we say, in the first place, that this is not a school. It is a home for the children. But if it is, the establishment of a girls' school is not a nuisance: *Baines* v. *Baker* (6). In some cases the question of nuisance has been improperly mixed up with the question of breach of covenant: *Doe* v. *Keeling*; *Harrison* v. *Good* (7). Secondly, as to the construction of the covenant, the Court ought not to look at the surrounding circumstances: *Kemp* v. *Bird* (8); but ought to construe the covenant strictly: *Pease* v. *Coats* (9). The covenant in the present case consists of two

(1) 1 M. & S. 95.
(2) 1 Sim. (N.S.) 517.
(3) 2 K. & J. 414.
(4) 2 A. & E. 161.
(5) 6 E. & B. 387.
(6) Amb. 158.
(7) Law Rep. 11 Eq. 338.
(8) 5 Ch. D. 974.
(9) Law Rep. 2 Eq. 688.

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C. A. 1877 GERMAN v. CHAPMAN. Argument.

parts, namely, that no building should be occupied otherwise than as a private residence, which is general; and that no building should be occupied for purposes of trade, which is particular; and the general clause should be interpreted and controlled by the particular. In keeping this school the committee are not exercising a trade: *Jones* v. *Thorne* (1); *Doe* v. *Bird* (2). It is in fact a private residence, for the public has no right of using it. No children are admitted except those selected by the committee: *Wickenden* v. *Webster* (3). We also contend that the Plaintiff has waived his right to enforce the covenant by giving permission for a boys' school to be established on the property. All the purchasers have to give a similar covenant, and it is entered into for the benefit of all; therefore a waiver as to one affects all the others: *Peek* v. *Matthews* (4); *Roper* v. *Williams* (5); *Duke of Bedford* v. *Trustees of British Museum* (6).

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am sorry to say I cannot take the view that the Vice-Chancellor has taken of the meaning of this covenant; and it appears to me that this case is to be decided without any reference at all to that long bead-roll of cases which it seems to be always thought necessary to cite in every case of this kind. The case must be decided upon the plain meaning, whatever that may be, of a few English words, which we have got before us. The draughtsman who prepared the covenant seems to have thought that it was safer to use few words, and not to dilute those words, or to complicate them with a long string of other words, by reason of which difficulties have been created in some of the cases to which we have been referred. In construing these words we must, no doubt, always have regard to this, that they are restrictive words, restricting the common law right of the owner of the land, of the person to whom the land has been granted, and therefore if there be any ambiguity in the words, or any reasonable doubt as to their meaning, this must be taken into consideration: so that the Plaintiff coming to seek the assistance of the Court must bring

(1) 1 B. & C. 715.
(2) 2 A. & E. 161.
(3) 6 E. & B. 387.
(4) Law Rep. 3 Eq. 515.
(5) T. & R. 18.
(6) 2 My. & K. 552.

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his case within the plain meaning of the contract which he is seeking to enforce.

Now what are the words here? The words are, "and also that no messuage, dwelling-house, or other building so to be erected or built on the same land, shall at any time or times hereafter be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade." It has been contended before us that those latter words "and not for any purpose of trade" are in some way to be used, or may be considered as restricting or defining or limiting the former words, that is to say, that the sole object of all those words to "be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade," is simply to say it shall not be used for any purpose of trade; because unless it goes to that extent it appears to me it is impossible to draw any line. If it does mean that the building shall not be used for any purpose of trade, and if it is not used for any purpose of trade, then it may be used for any other purpose whatever; that would be striking out entirely from the covenant the words "used or occupied otherwise than as and for a private residence only." I am of opinion that you cannot, upon any principle of construction, use the distinct words of the second clause so as entirely to strike out the former words from the covenant. Then, if you cannot give that effect to the words "for any purpose of trade," you have to construe the words themselves which are, "used or occupied otherwise than as and for a private residence only," and we must construe them according to their ordinary meaning. What is the meaning in ordinary language of those words? What is the meaning of using the house as a private residence? It is not necessary to say what is or what is not in every case a private residence, but to my mind, with all deference to the opinion of the Vice-Chancellor, who took a different view, it is impossible to say that in the ordinary use of English language the using of a place for a large institution (although a very charitable and beneficial institution) for the reception of one hundred girls to be lodged, boarded, and taught at that place, is using it as a private dwelling-house. To my mind such an institution is no more a private residence only than a club of gentlemen or a working men's club, or any other estab-

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C. A. 1877 GERMAN v. CHAPMAN. Judgment, C. A. James, L.J.

lishment of that kind, where a great number of persons are brought together. Whose private residence can it be said to be? It is not a question you can argue upon any philological considerations, or any other considerations except upon the plain meaning of the words as understood by the particular individual who applies his mind to it. I have arrived at the conclusion, and I am bound to say without any hesitation, that such an institution as this is not in any sense of the word a mere private residence only, and if that be so, this is an attempt to use this building otherwise than as a private residence.

Then it is said that there has been some waiver of some of the covenants on a small piece of land, part of the same estate at some distance off, and therefore that the whole thing is at an end. It is not very convenient to have such a question as that raised merely upon a casual answer given on cross-examination. It is nothing more than this, that when the witness is in the box he is asked, "Have you not waived something?" and he said he had waived a similar covenant as to a piece of land at some distance off in another corner of the estate. Then it is said, "You having done that, notwithstanding the covenants which were entered into with other people in subsequent grants, the whole thing is at an end." And for that proposition the well-known cases of *Roper* v. *Williams* (1) and *Duke of Bedford* v. *Trustees of the British Museum* (2) have been cited. It would be a monstrous thing if it were the rule of this Court that upon such an estate as the *Westminster* estate in *London* every one of the houses in *Belgrave Square* and *Eaton Square* is freed from any restrictive covenant of this kind because in some remote alley or back street upon the same estate somebody or other has been permitted to do something which is prohibited by his covenants. It can never be the meaning of those cases that such a conclusion should be arrived at. The principle, no doubt, is that which is expressed in *Peek* v. *Matthews* (3), which shews exactly upon what ground these cases proceeded, and which in that respect was perfectly right. The Vice-Chancellor in that case, in giving judgment, says: "In *Roper* v. *Williams* the Court, in considering whether it would grant specific

(1) T. & R. 18. (2) 2 My. & K. 552.
(3) Law Rep. 3 Eq. 515, 517.

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performance of a covenant of this description, which is framed only to provide uniformity in the mode of building, so that the enjoyment which springs from regularity in a series of dwellings may be preserved, held that he who seeks to enforce a covenant of this kind must suffer no such breach of the stipulation as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement." That is to say, if there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the Court for the purpose merely of harassing and annoying some particular man where the Court could see he was not doing it *bonâ fide* for the purpose of effecting the object for which the covenant was originally entered into. That is very different from the case we have before us, where the Plaintiff says that in one particular spot far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons could not do an act of kindness, or from any motive whatever relax in any single instance any of these covenants without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case application was made to the Plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the Defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate. It appears to me it is impossible to apply the principles of *Roper* v. *Williams* (1) and *Peek* v. *Matthews* (2) to such a case as this; therefore I think that there is no answer to the case which the Plaintiff has made out, that the intended use of this property would be a violation of the express

(1) T. & R. 18. (2) Law Rep. 3 Eq. 515.

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C. A. 1877

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Judgment, C. A. Baggallay, L.J.

covenant entered into, and the Plaintiff is therefore entitled to the injunction asked.

BAGGALLAY, L.J.:—

The question for present decision is whether the restrictive words contained in the covenant of *Chapman's* purchase deed apply to such an institution as that which the Respondents propose to establish upon the piece of land conveyed by that deed. The first question of course is, what is the proper construction to be put upon the covenant in question apart from any application of the words? Now, the covenant is that no building upon this piece of land shall "be used or occupied otherwise than as and for a private residence, and not for any purpose of trade." It has been contended that the effect of the two branches of the sentence taken together is to altogether do away with the force and meaning of the first branch, which restricts the use to a private residence only, and to limit the operation of the covenant to a mere restriction from using the building for any purpose of trade. It is impossible, on any principle of construction, to adopt this view of the case. It appears to me that you have first got the restriction from using the piece of land otherwise than as and for a private residence, and that then, possibly from abundant caution, the other words are introduced.

It is possible to conceive cases in which there might be a question whether, consistently with the use of it as a private residence only, some small matter of trade might not be carried on upon it, and therefore the additional words are added, "and not for any purpose of trade." I think that that construction is made still more clear if we depart from the particular words used here and look at what Mr. *Thurstan Holland* drew our attention to, namely, the surrounding circumstances—surrounding circumstances to be ascertained, not from sources extraneous to the deed, but which you find upon the face of the deed itself, which tells you that this piece of land is to be built upon with a certain number of houses, of not less than a specified value, all pointing to the occupation, in the neighbourhood of the town of *Sevenoaks*, of a piece of land for residential purposes, and residential purposes only. If this be the true construction of the covenant, it

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appears to me impossible to say that the establishment of such an institution as it is proposed to establish on this piece of land, and the carrying out of its objects, would be a use or occupation of the building as a private residence only. It is certainly contrary to our common understanding and to the common acceptance of the words, and it appears to me to be entirely contrary to the object and purport of the whole deed. If it were necessary to allude to authorities on the subject, I think the fact that this institution would come within the restrictive words of the covenant is entirely in accordance with the decision of the Court of Queen's Bench in *Wickenden* v. *Webster* (1), and with the judgment pronounced by the three Judges, and in accordance also with the view expressed by Vice-Chancellor *Wood* in *Johnstone* v. *Hall* (2), when the case was before him in the first instance; and we are informed by Mr. *Freeling* that he acted upon it also when the case came before him on a second occasion.

Then it is said that in this case there has been a waiver by the Plaintiff in respect of these restrictive covenants as regards another piece of the property in question, and that such waiver debars the Plaintiff from asserting a right here to enforce by injunction the performance of the covenant. The cases of *Roper* v. *Williams* (3) and *Peek* v. *Matthews* (4) have been relied upon. Those cases are very different from the present case. In both of them the object of the restrictive covenants was to secure the erection, in the one case of a row of houses, and in the other case of a succession of detached buildings; and in the one case the houses in the row were to be all of a similar character, and in the case of the detached buildings they were all to be built at a certain uniform distance from the road, and also of a uniform character. Upon an application for an injunction, it was held, that, inasmuch as the person seeking to enforce the covenant by injunction had himself permitted a departure from the covenant by allowing a portion of the land to be built upon in a way inconsistent with the covenant, he was not entitled to come to the Court and ask for relief by injunction, but was left to any remedy he had at law upon the covenant. I should observe, as

(1) 6 E. & B. 387.
(2) 2 K. & J. 414.
(3) T. & R. 18.
(4) Law Rep. 3 Eq. 515.

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regards *Roper* v. *Williams* (1), that the decision was given in that case not only on the ground of the permission to erect buildings, contrary to the covenant, upon another portion of the land, but also in consequence of the delay of the party in coming to the Court for relief. Here there is a very different case. There is nothing like an interference with uniformity of building or style of building, but permission has been given that at the extreme portion of fifty-seven acres of land a house may be built, and when built may be used otherwise than for a strictly residential purpose, according to the view which we take of the case. I assent, as a general principle, to the view which has been expressed by the Lord Justice as to questions of this sort being raised on cross-examination, but in this case there is probably this explanation, that it was not the hearing of the cause; if it had been brought to a hearing, this point would have been raised by answer, but when the motion for the injunction was heard it was treated as the hearing.

Thesiger, L.J. THESIGER, L.J.:—

I also think that this appeal ought to be allowed. We ought to attribute to the words "private residence only" their ordinary and popular significance, unless we can collect from the covenant a clear intention that some special or limited meaning should be attached to them.

Now, taking the words by themselves, I am clearly of opinion that an institution such as that which is the subject of the dispute in the present case cannot, in ordinary and popular parlance, be taken to come within the words "private residence only." But it it is contended on the part of the Defendants that you are to limit and to cut down the meaning of the words "private residence only" by the words following that sentence, "not for any purpose of trade." As regards that contention, in the first place it seems to me that it requires you to do violence to the express language of the clause, because we find nothing in the clause which shews an indication that the words "not for any purpose of trade" are to be a definition of the words "private residence only." On the contrary, we find them following the conjunction and according to the ordinary grammatical meaning of the words, constituting

(1) T. & R. 18.

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and forming a separate branch of the sentence. Secondly, it seems to me that, instead of merely cutting down the words "private residence only," if effect were given to this contention, you would be cutting out those words altogether, because the meaning of the sentence then would be simply this—that the premises should not be used for any purpose of trade. And in the third place, it seems to me that that contention is founded upon an erroneous impression that the words "not for any purpose of trade" are the antithesis to the words "private residence only," whereas, if you look to the whole of the sentence in which the latter words are contained, you will find that the sentence itself contains the antithesis. The sentence is "also that no messuage, dwelling-house, or other building so to be erected or built on the same land should at any time or times thereafter be used or occupied otherwise than as and for a private residence only." Therefore the antithesis to "private residence only" is that word "otherwise," and if you amplify that sentence, and read it in a different way, every messuage, dwelling-house, or other building so to be erected shall be used as a private residence and not for any other purpose, the fact that the word "otherwise" is the antithesis to "private residence only" is obvious and clear; and if the sentence be read in that way, it is also, as it seems to me, obvious and clear that the words "not for any purpose of trade" are an addition to the sentence, and not, as has been contended, a mere definition of the words "private residence only."

Upon the question of waiver, I agree with what has been said by the other Lords Justices, and I have only this to add, that it seems to me impossible, even giving the fullest effect to the decisions of the Court cited to us, to say that the allowance, upon the edge of a property consisting of fifty-seven acres of land, of a school, which is a private school for eighteen boarders, should put an end to the restrictive covenant over the whole of the fifty-seven acres, and allow anybody to place, not a school of the description in respect of which the restriction has been relaxed, but an institution of a public character, in which are to be boarded, lodged, and educated as many as 100 girls.

Solicitors: *Vizard, Crowder, & Co.*, agents for *Holcroft, Knocker, & Holcroft, Sevenoaks; Druce & Co.; Nash & Field.*

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C. A.
1877
Nov. 30.

BYRD *v.* NUNN.

[1876 B. 1.]

Pleading—Defence—General Denial—Rules of Court, 1875, *Order* XIX., *rr.* 17, 20, 23.

The statement of claim in an action for specific performance stated that the predecessor in title of the Plaintiff, by his agent lawfully authorized, signed an agreement with *H.*, the predecessor in title of the Defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that *H.*, the predecessor in title of the Defendant, was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by *H.* or any person by him lawfully authorized :—

Held (affirming the decision of *Fry*, J.), that, under the statement of defence, the Defendant could only enter into evidence to shew the unsoundness of mind of *H.*, and could not enter into evidence to shew that the agent was not duly authorized.

Statement.

THIS was an appeal from a decision of Mr. Justice *Fry* (1).

The action was brought for the specific performance of an agreement, in writing, to grant a lease of certain freehold premises alleged to have been made on the 20th of February, 1865, between the Defendant's predecessor in title, *John Hutley*, under the hand of his agent thereunto lawfully authorized, by writing, and the Plaintiff's predecessor in title, *Anthony Byrd*. The Plaintiff also claimed damages for breach of the agreement.

The 1st paragraph of the statement of defence was as follows :—

The Defendant denies that on the 20th of February, 1865, the Defendant's predecessor in title, *J. Hutley*, agreed, by writing, under the hand of his agent thereunto lawfully authorized, by writing, with the Plaintiff's alleged predecessor in title, *Anthony Byrd*, to grant to the said *Anthony Byrd* a lease of the said freehold premises. On the 20th of February, 1865, the said *J. Hutley* was of unsound mind, although not so found by inquisition, and he was wholly incapable of lawfully authorizing, and did not lawfully authorize, any person as his agent to sign any such agreement as in the Plaintiff's statement of claim alleged.

The Defendant then denied several other allegations, and

(1) 5 Ch. D. 781.

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alleged that the Plaintiff was in possession as yearly tenant only; and the 5th paragraph of the defence is as follows:—"The Defendant denies that any agreement for a lease of the said premises to the Plaintiff or his alleged predecessor in title was ever made or signed by the said *J. Hutley*, or any person by him lawfully authorized;" and the Defendant claimed the benefit of the *Statute of Frauds*.

Statement.

At the trial of the action Mr. Justice *Fry* was of opinion that under these pleadings the Defendant could only enter into evidence to shew the unsoundness of mind of *J. Hutley*, and could not enter into evidence to shew that he was not authorized as agent to make the agreement. His Lordship refused to give the Defendant leave to amend the statement of defence.

Evidence having been adduced as to the alleged unsoundness of mind of *Hutley*, the Judge was of opinion that he was not of unsound mind, and accordingly gave judgment in favour of the Plaintiff for specific performance.

The Defendant appealed from this judgment.

Argument.

Fischer, Q.C., and *W. W. Cooper*, for the Appellant:—

The pleadings are sufficient to raise the issue that the agent had no authority to make the agreement, as well as the issue of unsoundness of mind. The 1st paragraph raises the latter issue, and the 5th raises the issue of authority. This form of pleading was held good in *Whaley* v. *Bagnel* (1). If pleadings are to be construed so strictly the old system of special pleading will be restored. There was nothing in the pleading in the present case to mislead the Plaintiff. If the Court should hold the pleadings insufficient, we ask for leave to amend in order to raise the issue of authority.

Cookson, Q.C., and *B. Eyre*, were only called on upon the question of amendment. They referred to Rules of Court, 1875, Order XIX., rules 17, 20, 23: and *Thorp* v. *Holdsworth* (2).

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the statement of defence was not sufficient to raise the issue of want of authority, and that the Judge who

(1) 1 Bro. P. C. 345. (2) 3 Ch. D. 637.

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tried the action was right in not admitting evidence on that point. There can be no doubt that on the pleadings the substantial issue which the Defendant desired to raise, the insanity of the alleged agent, would have gone to the whole root of the matter; and I am of opinion that the pleadings are confined to that issue.

With respect to the leave to amend, I think that we ought not to interfere with the discretion of the Judge in the Court below in such a case. If a Defendant were to be at liberty to put in a defence inconsistent with the rules of pleading, and then at the trial get the case to stand over in order to put in a new defence, the consequences might be very prejudicial. If a proper case for amendment had been made out at the trial, the Judge, who had all the facts before him, might have given leave to amend at the time, and have proceeded to try the action at once. But it is a matter entirely in the discretion of the Judge, with which this Court ought to be very chary in interfering. The appeal must be dismissed with costs.

Baggallay, L.J. BAGGALLAY, L.J. :—

I agree with Mr. Justice *Fry* that the main object of the Defendant's pleading was to set up the question of the unsoundness of mind of the alleged agent. This statement of defence was contrary to the spirit of the Rules of Court, Order XIX. rr. 17, 20, 23. The object of these rules was to insure a proper statement of the issues intended to be raised in the defence, in order that the other party might know to what to direct his evidence. As far as I can see, the unsoundness of mind of *Hutley* was the substantial ground of defence relied on by the Defendant. Possibly the 5th paragraph, if taken by itself and without reference to any other part of the statement, might have been held sufficient to raise the alternative issue now sought to be raised; but looking at it in connection with the other paragraphs of the statement of defence, I am satisfied that the unsoundness of mind was the only substantial issue raised.

As regards the question of leave to amend, it is a matter entirely in the discretion of the Judge; and even if I had thought it a fit case for amendment, as at first I was disposed to do, I should be unwilling to interfere with that discretion.

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THESIGER, L.J.:—

I am of the same opinion. I should always be unwilling to deprive a Defendant of any particular defence if there had been a mere slip in the pleading, and if the defence desired to be raised was a substantial defence; and in such a case I should be disposed to allow an amendment. But we must bear in mind that when the case was before Mr. Justice *Fry* he had all the facts before him, and he knew that the point which the parties had come to try was the unsoundness of mind of *Hutley*. This being so, I do not think that we ought to interfere with the discretion of the Judge in refusing leave to amend.

The question remains whether the Defendant has sufficiently pleaded in his statement of defence the point which he now desires to raise. I agree with the learned Judge that he has not done so. A variety of matters are set forth in the statement of claim shewing the Plaintiff's cause of action, namely, that the agreement was made, that it was in writing, and that it was made by an agent properly authorized. Under the old common law system of pleading, all these matters necessary to be stated might have been put in issue by pleading the general issue, which would have had the effect of traversing all the particular allegations. But that system of pleading, while it tended to raise clear issues, had the disadvantage that Plaintiffs had no means of knowing what the real point to be tried was. The new Rules were expressly framed to prevent that, and to make the Defendant take matter by matter and traverse each of them separately. Has the Defendant done this in the present case? He seems to me to have fallen back into the old system of common law pleading, except that instead of pleading *non assumpsit* he has amplified that plea by traversing as a whole the several allegations of the Plaintiff in such a manner as, but for the present rules of pleading, would put him in the position of being able to disprove any one allegation without the others. I think it is a question whether the 1st paragraph of the defence ought not to have been struck out as embarrassing. But I think that on a fair construction of that paragraph the Defendant may be taken to have meant that the agreement was not made by an agent properly authorized because the principal was of unsound mind; and therefore I agree with

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the Judge that the issue of the authority of the agent, apart from the incompetency of the principal, was not raised by that paragraph. As to the 5th paragraph, I at first thought that there was some force in Mr. *Fischer's* argument that it sufficiently raised the question of agency, but when that paragraph is looked at attentively, it is clearly contrary to the rules which have been drawn up to prevent that kind of pleading. There is no specific fact traversed by that paragraph, but, as in the case of the 1st paragraph, so the 5th is also open to the remark that under it the Defendant might have set up either, first, that there was no agreement in fact, or secondly, that it was not in writing, or thirdly, that the agent had no authority, or fourthly, that the principal was not competent to give authority, being of unsound mind—the very thing that the Rules were intended to prevent. As the unsoundness of mind was the substantial defence set up, I think we must read the statement of defence altogether as referring to that ground of defence, and must conclude that it does not raise the general issue that there was no agreement by an agent duly authorized.

Solicitors for Plaintiff: *Evans & Eagles.*
Solicitor for Defendant: *J. L. Morris.*

C. A. 1877 M. R. *Aug.* 8. C. A. *Dec.* 1, 3.

COOPER *v.* MACDONALD.

[1855 C. 117.]

Married Woman — Equitable Estate Tail — Separate Use — Restraint on Alienation — Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *s.* 77 — *Curtesy.*

A married woman, under the limitations of a will made in 1846, was equitable tenant in tail to her separate use of certain freehold estates. By a clause in the same will she was also restrained from alienation of the rents and profits. Her husband became bankrupt, and after his order of discharge joined with his wife in barring the equitable entail and limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, and the husband's assignees claimed the husband's estate by curtesy:—

Held (affirming the decision of *Jessel*, M.R.), that the restraint on anticipation did not prevent the wife from barring the entail and acquiring the

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equitable fee; and that the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate.

Per Jessel, M.R.:—It is now settled that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy.

Statement.

WILLIAM MACDONALD, by his will, dated the 5th of December, 1846, gave his residuary real estates to four trustees upon trust as to certain parts thereof for his son *Charles* for life, with remainder to his children as tenants in common in tail; and in default of such issue in trust for the testator's other children as tenants in common in tail; and as to certain other parts to his other sons, *Thomas* and *Edward*, and his daughters, *Adelaide*, *Angelina*, and *Emily*, for similar estates, with similar gifts over on failure of their issue to the testator's other children as tenants in common in tail. And the testator directed that upon each of his daughters attaining the age of twenty-one years his trustees should pay the rents and annual income of the said hereditaments and other premises, whether original or accruing, thereinbefore devised for her benefit, from time to time as they should accrue, into the proper hands of his said daughter, or permit the same to be received by her for her sole use, free from the control, debts, or engagements of her husband, as a separate and inalienable provision, without power of alienation or anticipation, and for which the receipt alone of such daughter, whether covert or sole, should be a sufficient discharge to his said trustees. And the testator also declared that the interest or benefit which any female might take under his will should be held, received, and enjoyed by her for her sole and separate use, independent of the debts, interference, or engagements of any husband she might marry.

The present suit was instituted for the administration of the estate of the testator.

The testator's children, *Charles*, *Thomas*, *Edward*, and *Angelina*, died without issue, in consequence of which their portions of the testator's real estate devolved upon his other daughters, *Adelaide*, the wife of *James Cooper*, and *Emily*, the wife of *H. W. Matthews*, as equitable tenants in common in tail for their separate use.

James Cooper was adjudicated bankrupt on the 11th of May,

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1864, and obtained his order of discharge on the 25th of May, 1865.

Statement.

On the 21st of July, 1875, *Adelaide Cooper* executed a disentailing deed, to which her husband was a party, of the equitable entail in her moiety of the real estates, which had formerly belonged to her deceased brothers and sister, and limited it to *Edwin Earl* in trust for her separate use in fee.

Mrs. *Cooper* died in December, 1876, having by her will, made on the 22nd of July, 1875, devised all her real and personal estate for the benefit of her children.

An application had been made in Chambers by Mrs. *Cooper's* children for an order for maintenance out of the real estates devised by their mother's will, which was opposed by the assignees under the bankruptcy on the ground that *James Cooper* was entitled to the estates during his life as equitable tenant by the curtesy, and that his interest had passed to his assignees. The matter was adjourned into Court, and came on for hearing before the Master of the Rolls on the 8th of August, 1877.

Argument.

Chitty, Q.C., *Davey*, Q.C., and *Speed*, for the applicants:—

Mrs. *Cooper*, having an equitable estate tail as an "interest or benefit" settled to her separate use by the last clause of the will, had power to dispose of that estate tail just as if she had been a *feme sole*, including a power to bar the entail. She had in fact a complete right of alienation as incident to her separate estate: *Taylor* v. *Meads* (1); and that right she exercised by the disentailing deed, by which the property was again settled to her separate use. Being thus entitled to the equitable fee simple for her separate use, she was enabled to dispose of the property by will, and, according to *Moore* v. *Webster* (2), her husband could have no claim as tenant by the curtesy. However, in the subsequent case of *Appleton* v. *Rowley* (3), Vice-Chancellor *Malins* held, on the contrary, that a husband was entitled by the curtesy to real estate of which his wife was equitably seised in fee, but in that case the wife died without having made any disposition of the estate, which was not the case here. What his Lordship there says is precisely

(1) 4 D. J. & S. 597. (2) Law Rep. 3 Eq. 267.
(3) Law Rep. 8 Eq. 139.

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applicable to our case: he says (1), "The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation."

[JESSEL, M.R.:—I see that Mr. *Lewin*, in his treatise on Trusts (2), treats it as settled that the husband is entitled by the curtesy where there is a trust for the separate use of the wife in fee.]

Lord *Hardwicke* decided the point both ways, for in *Roberts* v. *Dixwell* (3) he decided in favour of the curtesy, and in *Hearle* v. *Greenbank* (4) against it. In the notes to *Coke* upon *Littleton* by *Hargrave* and *Butler* (5), it is said that up to that time Courts of Equity had allowed curtesy out of trusts. In *Bennet* v. *Davis* (6) it was held that where the husband had become bankrupt he took his estate by the curtesy merely as trustee, not for the creditors but for the heirs of the wife.

There is nothing in the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74) to prevent a married woman who is tenant in tail to her separate use from barring the entail. On the contrary, sect. 15 is most general in its terms, for it enables "every actual tenant in tail" to bar the estate tail; and it would seem that the consent of the husband is not necessary to such a disposition by the wife, for in the analogous case of the wife being entitled to her separate use for life with remainder over in tail, the husband is not protector of the settlement within sects. 22, 24, and 34, so as to render his consent necessary to an absolute disposition by the tenant in tail, since she alone is the protector and the proper person to consent: *Keer* v. *Brown* (7). The disposition of lands by a married woman who is not entitled for her separate use is regulated by sects. 40 and 77.

Ince, Q.C., and *Colt*, for the Respondents, *Cooper's* assignees, contended that upon the true construction of the will the separate use attached to Mrs. *Cooper's* life estate only; that she was restrained from anticipation; that her husband having become

(1) Law Rep. 8 Eq. 142.
(2) 5th Ed. p. 524; 6th Ed. p. 607.
(3) 1 Atk. 607.
(4) 3 Atk. 695, 715, 716.
(5) 29 a, note 6.
(6) 2 P. Wms. 316.
(7) Joh. 138.

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bankrupt had no power to concur with her in barring her estate tail and so defeating his assignees; and, consequently, that on her death he became entitled to an interest in her estate tail as tenant by the curtesy.

[They cited *In re Ellis' Trusts* (1); *Baggett* v. *Meux* (2); *Troutbeck* v. *Boughey* (3); *Robinson* v. *Wheelwright* (4); *Bac.* Abr. "Curtesy of *England*."]

Bagshawe, Q.C., and *Maidlow*, for the trustees of the will.

Judgment, M.R.

JESSEL, M.R.:—

This case is one of some singularity, and, as far as I know, is not exactly covered by authority. I will, therefore, say something on what I consider the principle of law to be decided, and I will then, as is my habit, comment upon the authorities in order to see whether there is anything to prevent my deciding the case according to principle.

Now the gift in the will must first be construed; the first question I have to decide being whether the separate use attaches to the tenancy in tail, or whether it is limited to the income to accrue due during the life of the daughter. [His Lordship then read and commented on the clauses of the will, as above stated, and came to the conclusion that the separate use attached to the tenancy in tail as well as to the income. His Lordship then continued:—]

That being so, what is the effect of the separate use standing alone? I say it gives the wife the power of disposition as if she were a single woman. Now that is important. I have already had to consider the question more than once, and I have said that separate use has a meaning as attached to capital as well as attached to income. As regards capital, it does more than secure the income to the wife; it secures her a power of alienation; it is in fact the only meaning to be attributed as regards the capital itself as distinguished from the income. If you said, "I give the income to her separate use, and I give the capital also to her separate use," the second phrase would have no meaning in addition to that

(1) Law Rep. 17 Eq. 409.
(2) 1 Coll. 138; 1 Ph. 627.
(3) Law Rep. 2 Eq. 534.
(4) 6 D. M. & G. 535.

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which had previously occurred except to give her a power of alienation.

In other words, a gift of a fee simple estate or a gift of a capital sum of money to the separate use of a married woman gives her the same power of alienation over it as if she were a single woman. She is entitled to dispose of it as if she were not a married woman at all, and that at once gets rid of any notion of the husband having an interest. Whatever interest he would have had in the absence of disposition is got rid of by the disposition.

The separate use is a creature of equity, and equity says the estate may be so limited to the married woman as that she can get rid of every possible interest of the husband. That is the meaning of a limitation to her separate use and free from his interference or control. It is exactly the same for this purpose as if the estate had been limited to such uses as the married woman shall by deed or will appoint; it entirely destroys the notion of the husband having any interest in it as against her disposition.

Now, on that point it is only necessary to read one sentence from Lord *Westbury's* judgment in *Taylor* v. *Meads* (1). He says (2): "The estate given to *Elizabeth Meads*," who was the married woman in the case, "is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman." As regards the words "husband shall have no interest in the estate so devised," he means as against the wife.

That being so, it seems to me that the married woman in the present case had a power of disposition. Now, what power of disposition? She could not dispose of the estate tail by deed as against herself, because at all events she was restrained from alienation as regards the income; but there is in this will a further clause that she is not to do anything as against the income which would deprive her of the benefit of it; so I am quite clear that, as far as the income is concerned, she could not dispose of the estate at all. There is not, in words, any such restriction on the disposal

(1) 4 D. J. & S. 597. (2) 4 D. J. & S. 607.

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of what I will call a reversion, although it is not so, because it is one estate. The income during her life is not disposable, but the capital after her death seems to be disposable on this will.

Now, I will assume for the present that the argument of the Respondents' counsel is right, that the fetter is on the whole estate. What is the meaning of the fetter? The meaning is exactly that which was expressed by the old common form of conveyancers, "so as in nowise to deprive herself of the benefit thereof by way of anticipation." The meaning was to give the actual enjoyment to the married woman for her own benefit, not for the benefit of anybody else; and it is absurd, it appears to me, to extend such an equitable provision as this so as to prevent a married woman enlarging the estate tail into an estate in fee simple for her own benefit. That is not an alienation so as to deprive herself of anything; it is not, strictly speaking, perhaps, an alienation at all, except in a very wide sense of the term. It is, strictly speaking, what is always called an enlargement of the estate. The mode in which it is done is by a conveyance which is called an alienation, but it is really nothing more than making that estate already given to the married woman indefeasible. If that is so—and all the clauses or fetters on alienation, if applying to the estate tail, would equally apply to the pure fee simple—why should I construe that clause against anticipation, which was invented by a Lord Chancellor for the benefit of a married woman, to her damage and injury?

It appears to me that would be a wrong construction, and altogether opposed to principle. That would amount to saying that that clause which was intended to give her the full benefit of the property is to deprive her of the right of extending that benefit in her own favour, and I entirely decline so to construe the clause against my own views had it been even more extensive than it appears to me to be in this will.

Now, let us look at the enabling clause of the *Fines and Recoveries Act*. The enabling clause, sect. 15, provides that: "Every actual tenant in tail . . . shall have full power to dispose of for an estate in fee simple absolute . . . the lands entailed," as against in fact all persons whose estates are to take effect either under the estate tail, or after the determination or in defeasance

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of the estate tail. That is all. It is a power of disposition against those persons to destroy their interest to that extent, and to increase the interests of the married woman. As I said before, there is nothing in the Act of Parliament and nothing in the equitable rule, as I understand it, which prevents her effecting such a disposition. Then the 40th section says this, and a good deal of argument has turned upon it: "If the tenant in tail making the disposition be a married woman, the concurrence of her husband shall be necessary to give effect to the same."

In this case the husband did concur. Now it appears to me the husband's concurrence was requisite, because the separate use could not enable a married woman to turn an estate tail into an estate in fee, whatever else it does. The only way of turning an estate tail into an estate in fee is by virtue of the provisions of the Act, and the Act does require the concurrence of the husband. But there was the concurrence of the husband, which made the title under the Act perfectly good, and she then could devise the estate in fee.

But then this argument was used: it was said that the husband had in the meantime become bankrupt, and was entitled to an estate by the curtesy, and he could not concur after his bankruptcy. Now I will first of all consider whether he had an estate by the curtesy or not, because that has been very much argued. It appears to me that he had and he had not, that is to say, as I understand the law, if the married woman had never appointed or alienated the estate, but had died being tenant in tail in equity or tenant in fee in equity, the husband would have had an estate by the curtesy, whether the estate of the married woman was merely equitable without the separate use, or whether it was equitable together with the separate use; and my reason for saying so on principle is this, that with one notable exception familiar to conveyancers, that of dower, in the incidents of estates equity follows the law, and that would therefore give to the husband the same estate by the curtesy in his wife's equitable estate as he would have in her legal estate. There was no reason to the contrary. When the wife died intestate—for that is the assumption—her husband would take something and her eldest son would take something, and they would be both equitably entitled. As I said before,

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there was no reason why that disposition should be altered in any degree. The wife's property would descend to her eldest son, subject to the husband's estate; there equity followed the law; but then came the separate use of the wife, which engrafted something on the equitable estate; it took away from the husband the right to receive the income during the coverture, or, as it was called, the equitable estate during the coverture; it gave the wife the absolute ownership during the coverture, and if the separate use attached also to the capital, it gave her the right of disposing of it either by deed or will irrespective of the husband.

It therefore appears to me that to carry that out, the right to the separate use entitled her to dispose of it as much against the husband's estate by the curtesy as against the son's estate as heir. It enabled her to make a pure and clear disposition of it, and in that way it was wholly independent of the husband. But that is no reason for carrying it a step beyond. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate? Why should it say, I prefer the eldest son to the husband, who had a right at law of succeeding during his life, so to speak, to the estate which had become vacant by the death of the wife? I can see no reason on principle; and therefore it appears to me, if you decide on principle only, you will come to this conclusion, that where a wife, either by deed *inter vivos* or by will, disposes of the fee simple settled to her separate use, that disposition takes effect free from any claim of the husband or the eldest son or other heir-at-law; but that where she dies without making any such disposition, the rights of the husband and rights of the heir are equally unaffected, and equity ought to follow the law.

Is there any authority for, or is there any against, that construction? Now, I must say that the authorities which have been cited in more than one instance are not as satisfactory as they might be. They seem to me to be, to some extent, conflicting; but I think the principle I have laid down will fairly reconcile them. There are two well-known decisions of Lord *Hardwicke*

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which, I think, the ingenuity of man cannot well reconcile. The earlier one, *Roberts* v. *Dixwell* (1), appears to me to be quite different to the later one of *Hearle* v. *Greenbank* (2). Of course, if there had been no other decision and no other view taken of the law, I should have been bound to follow the later one, because, being decisions of the same Judge, the later one prevails. The law, however, has been considered settled a great many years ago, and of the two conflicting decisions the earlier one has been adopted. I find a decision of Sir *John Leach* as long ago as 1821, where he considers the law to be settled; and it would be very difficult now, if nothing else had occurred, to say in the year 1877 that it was not settled. That is the case of *Morgan* v. *Morgan* (3). I find that followed by a decision of the late Vice-Chancellor of *England*, Sir *Lancelot Shadwell*, in the case of *Follett* v. *Tyrer* (4), in which he also treats the law as settled; that is, that notwithstanding the separate use and in the absence of disposition, the husband has an estate in curtesy which, as I have said before, appears to me to be consonant with principle.

And I find that after those two decisions, and for many years the text-books—and I have one before me, *Lewin* on Trusts—treat the law as settled; and they treat the law as settled down to 1866, for in the 5th edition of his book Mr. *Lewin* says (5): "It was formerly doubted whether in this case curtesy was not excluded. Lord *Hardwicke* was originally in favour of the curtesy, but in a subsequent case (without any allusion, however, to his former opinion) he decided against the claim of the husband. It has since been determined that the husband is entitled." When you find law of that kind getting into the text-books as settled law, and with two such decisions as I have mentioned, it ought to be settled. However, unluckily, an attempt was made in 1866 to unsettle it, for the very point came before the Vice-Chancellor *Stuart* in *Moore* v. *Webster* (6), and, very much to my surprise, I find him stating that there is neither principle nor authority for that proposition; but how he could say there was no authority when *Morgan* v. *Morgan* and *Follett* v. *Tyrer* were cited, I do not

(1) 1 Atk. 607.
(2) 3 Atk. 695, 715, 716.
(3) 5 Madd. 408.
(4) 14 Sim. 125.
(5) Page 524.
(6) Law Rep. 3 Eq. 267.

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understand. However, having persuaded himself there was neither principle nor authority to prevent his so doing, he decided the other way.

In the year 1869 the same point came before Vice-Chancellor *Malins* in *Appleton* v. *Rowley* (1), where, after reviewing the authorities, he considers the law settled, declines to follow Vice-Chancellor *Stuart*, and says, "I am unable to concur in that decision, for there the whole equitable fee was given to the wife;" and he lays down the rule that wherever the wife is in equity entitled to an estate of inheritance there the husband takes as tenant by the curtesy. As I said before, in the absence of a disposal by the wife he takes an estate by curtesy. That being so, I think Mr. *Lewin* was justified in his sixth and last edition in repeating his text as he had it before, as being settled law, referring in his note to the two most recent decisions on the subject. I must, therefore, decline to consider the point as fairly open for discussion. So much for the authorities.

Now, that being so, this point was pressed upon me. It was said the husband had been a bankrupt, and the wife, treating her as a single woman, could not by will dispose of an estate tail; she only disposed of it by having enlarged her estate tail into a fee simple, so as to enable her to dispose of it by will, it being assumed for this purpose, although I do not agree with it, that she could not dispose of it by deed subject to reserving to herself the income. But the answer is a very plain one. The statute says she may do it, but she shall not do it without the concurrence of the husband. The husband has concurred. There is no limit placed by statute on the concurrence of the husband. There is no bargain on the part of the husband that he will not concur with the wife when he becomes bankrupt. Whether or not he could have made such a bargain under the provisions of the statute for the abolition of fines and recoveries, I do not say. But there is no such bargain. An assignee simply takes what he can get. There is nothing in the *Bankruptcy Act* to prevent the husband concurring when his concurrence is necessary; and therefore it does not appear to me that the bankruptcy of the husband interfered with his concurrence, and I should be making a new statutory

(1) Law Rep. 8 Eq. 139.

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provision if I said he could not give his concurrence after the bankruptcy.

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Even, therefore, assuming, which, as I said before, I do not think is the true assumption, that the fetter on alienation extended to that portion of the estate which remained after the decease of the wife, I do not think there was anything in the fact of the bankruptcy which prevented the husband concurring in this alienation, or which in any way affected it.

The result, therefore, is, that I am of opinion the estate was well devised by the wife, and that the children take.

From this decision the Respondents, the assignees, appealed. The appeal was heard on the 1st and 3rd of December, 1877.

C. A.

Ince, Q.C., and *Colt*, for the Appellants:—

Argument.

The first question is whether a husband is entitled to curtesy out of real estate belonging to his wife for her separate use, and on this the Master of the Rolls was in our favour: *Roberts* v. *Dixwell* (1); *Morgan* v. *Morgan* (2); *Follett* v. *Tyrer* (3); *Appleton* v. *Rowley* (4), notwithstanding *Moore* v. *Webster* (5). Then, if so, was the disentailing deed effectual? Under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), s. 40, an entail is barred by one of the assurances, which, if the tenant in tail were tenant in fee simple, would pass the estate. Now if this tenant in tail had been tenant in fee she could not have passed the estate, for she was restrained from alienation: *Robinson* v. *Wheelwright* (6); *Baggett* v. *Meux* (7); *Taylor* v. *Meads* (8); *Clive* v. *Carew* (9); *In re Ellis' Trusts* (10); *Jackson* v. *Hobhouse* (11). The life interest is an integral part of the estate tail, and cannot be treated as disconnected from it. In the Irish *Fines and Recoveries Act* (4 & 5 Will. 4, c. 92), s. 69, there is a proviso that a restraint upon anticipation shall override the power of disposition given by the Act. A deed by which the married woman limits the fee to

(1) 1 Atk. 607.
(2) 5 Madd. 408.
(3) 14 Sim. 125.
(4) Law Rep. 8 Eq. 139.
(5) Ibid. 3 Eq. 267.
(6) 6 D. M. & G. 535.
(7) 1 Coll. 138; 1 Ph. 627.
(8) 4 D. J. & S. 597.
(9) 1 J. & H. 199.
(10) Law Rep. 17 Eq. 409.
(11) 2 Mer. 483.

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COOPER v. MACDONALD.

herself to her separate use is a manifest overruling of the restraint on anticipation.

[JAMES, L.J., referred to *Dawkins* v. *Lord Penrhyn* (1).]

Argument.

But suppose the disentailing deed effectual, as soon as there was an equitable fee in the wife and issue had been born the husband's right of curtesy attached, and the will of the wife could not defeat that inchoate right: *Co. Lit.* (2).

Chitty, Q.C., *Davey*, Q.C., and *Speed*, for the Respondents, were not called on.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

It appears to me that we cannot dissent from the judgment of the Master of the Rolls in this case.

A married woman had an equitable estate tail given to her for her separate use—which means that she might deal with it as if she were a *feme sole*—and there was no restraint on her alienation of it except as regarded the income of her life estate. It appears to me impossible to contend that this clause restraining her from anticipating the income of her life estate could limit her power to enlarge the estate tail into an estate in fee. The fact of her having the estate tail for her separate use means that it is to be preserved from the interference of the husband. If she had made no disposition of it, the estate by curtesy would have attached for the benefit of the husband. We have nothing to do with that; the only question before us is whether she had obtained an absolute right of devising it by will, and I think she had obtained that right.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. The will gave Mrs. *Cooper* an equitable estate tail to her separate use, and there was no restraint or alienation beyond the actual rents during her life. Then the clause at the end of the will is perfectly general; the testator declares that "the interest or benefit which any female might take under his will should be held, received, and enjoyed by her to her sole and separate use." This must apply to the whole of

(1) 6 Ch. D. 318. (2) 30 a, 40 a.

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the estate in the married woman. Then a deed was executed barring the estate tail and the subsequent estates under which the married woman obtained a new estate, and acquired an absolute power over the property. By this the inchoate right of the husband to curtesy was lost. I am therefore of opinion that the assignees have no claim on the estate, and the appeal must be dismissed with costs.

THESIGER, L.J., concurred.

Solicitors: *Nicol, Son, & Jones; Langley & Gibbon.*

BOOSEY *v.* FAIRLIE.

[1874 B. 171.]

Copyright—Musical Composition—Registration—Copyright Act (5 & 6 *Vict.* c. 45)—*International Copyright Act* (7 *Vict.* c. 12), *s.* 6.

On the 10th of March, 1869, an opera composed by *O.*, a French subject, was first represented at a theatre in *Paris*. On the 28th of March, 1869, a pianoforte arrangement of the music of the opera, made by *S.* with *O.*'s consent, was published at a shop in *Paris*, and about the same time an arrangement by *S.* for piano and voices was also published. In June, 1869, *O.* assigned the opera and the copyright and the right of public representation to *B.*, an English subject, and handed over to him the MS. score. Upon this assignment a registration was made under the *International Copyright Act* (7 Vict. c. 12), s. 6, and a copy of the pianoforte arrangement was deposited at *Stationers' Hall*. The entry on the register gave the title of the opera, the name of the composer, the name of the proprietor of the copyright (describing him as the proprietor of the copyright in the music and the right of publicly performing such music), the time and place of first publication, "28th March, 1869, *Rue* ——, *Paris, France*," and also the time and place of first representation, "*Théâtre* ——, *Paris, France*, 10th March, 1869," but did not mention the name of *S.*, nor did it in any way, except by the entry of the time and place of first publication, refer to the pianoforte arrangement. In August, 1869, four separate instrumental parts of the opera were published, but the rest of the score remained in MS.

In 1874, *F.* brought out at his theatre in *London* an opera in English under the same title, and announced as with music by *O.*, a substantial part of the music of which was taken from one of the arrangements by *S.*

In a suit by *B.* to restrain *F.* from infringing his copyright in the opera and sole right of public representation:—

Held, by *Bacon*, V.C., that the registration was defective under the *International Copyright Act* (7 Vict. c. 12), in not mentioning the name of *S.* as

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the author of the pianoforte arrangement, the thing really registered, and from which alone *F.* had taken the music, and gave *B.* no title to sue for an infringement of his alleged right.

Held, on appeal, that what was intended to be registered was the opera by *O.*, and not the book containing the pianoforte arrangement by *S.*; and that as the proper entries for that purpose were made, the additional entry of a date applicable only to the arrangement by *S.*, and the deposit of the book containing that arrangement, did not invalidate the protection which would otherwise have been obtained of the sole right of performing the opera:

Held, further, that the omission of the Plaintiffs to deliver to the officer of the *Stationers' Company* a copy of the four instrumental parts which were published in August, 1869, did not invalidate the protection obtained by the registration, such publication not being a publication of the opera within the meaning of the statute 7 Vict. c. 12, and the convention with *France* under that Act:

Held, further, that a dramatic representation in which a substantial part of the music of *O.'s* opera was performed was an infringement of the sole right of publicly performing that music, though the operatic score was obtained by independent labour bestowed on the arrangement of *S.*, which was not protected.

Statement.

THE bill in this cause, filed on the 29th of May, 1874, and amended on the 13th of February, 1875, by Messrs. *Boosey*, of *Regent Street*, music publishers, sought to restrain the Defendant *Fairlie*, at that time manager of *St. James's Theatre*, from representing and performing at the *St. James's Theatre* or elsewhere the musical composition known as "*Vert-Vert*," from announcing the music of his opera as *Offenbach's*, or otherwise infringing the Plaintiffs' rights in respect thereof, and to obtain compensation or damages for such infringement of their rights.

In 1869 *Jacques Offenbach* composed an *opéra bouffe*, called "*Vert-Vert*," which was played for the first time at the *Opéra Comique*, in *Paris*, on the 10th of March, 1869. A pianoforte arrangement from the full score was made by a M. *Soumis*, with *Offenbach's* consent, and on the 28th of March, 1869, printed and published as "*Partition pour piano seul arrangée par L. Soumis*," at 10, *Rue de la Chaussée d'Antin*, in *Paris*. About the same time another arrangement by *Soumis* for piano with voices, and with the insertion at the commencement of the overture and in other places of the names of the musical instruments used in the operatic score, was published as "*Partition chant et piano arrangée par L. Soumis*."

In June, 1869, *Offenbach* assigned, for valuable consideration,

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the said opera and the copyright of and in the same, with the right of publicly playing and performing the music, to the Plaintiffs, and handed over to them the full MS. orchestral score. The opera was thereupon, on the 9th of June, 1869, registered at *Stationers' Hall*, under the provisions of the *Copyright Act* (5 & 6 Vict. c. 45) and the *International Copyright Act* (7 Vict. c. 12), and a copy of the printed pianoforte arrangement delivered to the proper officers. The entry of this registration was as follows:—

Time of making the entry.	Title of Book.	Name and place of abode of the Author or Composer.	Name and place of abode of the Proprietor of the Copyright.	Time and place of first publication.
June 9, 1869.	*Vert-Vert, Opéra Comique, en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach.*	*Jacques Offenbach,* 11, *Rue Lafitte, Paris, France.*	*Jacques Offenbach,* 11, *Rue Lafitte, Paris, France,* Proprietor of the copyright in the music, and of the right of publicly performing such music.	28th March, 1869, 10, *Rue de la Chaussée d'Antin, Paris, France.* Time and place of first representation:— *Théâtre Impérial de l'Opéra Comique, Paris, France.* 10 March, 1869.

The title-page of the book deposited at *Stationers' Hall* was,

"*Théâtre Impérial de l'Opéra Comique,*
A Mons. Victor Capoul,
Vert-Vert,
Opéra Comique, en 3 *Actes.*
Paroles de
MM. Meilhac et Nuitter.
Musique
de
J. Offenbach.
Partition pour piano seul arrangée par L. Soumis.
Prix net 10 *f.*
Paris: E. Heu Editeur, 10, *Rue de la Chaussée d'Antin. Londres: Boosey & Co. Berlin: Bock. Italie, Espagne, Portugal, Belgique, Suisse, Russie, &c.*
Déposé selon les traités internationaux."

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On the same day the Plaintiffs, as assignees of the copyright, registered their assignment at *Stationers' Hall*, which was entered as follows:—

Date of Entry.	Title of Book.	Assigner of the Copyright.	Assignee of Copyright.
June 9, 1869	*Vert-Vert, Opéra Comique, en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach.* See Foreign Entries, page 115.	*Jacques Offenbach*, 11, *Rue Lafitte, Paris, France*, Proprietor of the copyright in the music, and of the right of publicly performing such music.	*Charles Boosey* and *John Boosey*, of No. 28, *Holles Street, Middlesex*, as assignees of the copyright in the music of the said book, and also of the sole right of publicly performing such music.

The Plaintiffs' case was, that by virtue of such sale, assignment, and registration, they became the sole proprietors of the opera and music, and of the copyright thereof, and of the right of publicly playing and representing and of publishing the same, and allowing the same to be played, represented, and published.

On the 9th of August, 1869, four of the orchestral parts of the opera, viz., the parts for first and second violins and tenor, and the part for violoncello and contrabasso, were printed and published for sale in *Paris*. No copy of any of these parts was delivered to the officer of the *Stationers' Company*. The rest of the score remained in manuscript. The book containing the piano arrangement was not registered at *Stationers' Hall*, nor was *Soumis'* arrangement for voices and piano registered.

On the 2nd of May, 1874, the Defendant, then manager of the *St. James's Theatre*, brought out an *opéra bouffe* called "*Vert-Vert*," with English words written by Messrs. *Herman* and *Mansel*, and with music, a considerable portion of which was taken and arranged by *Vandenbossche*, the Defendant's conductor, from one of *Soumis'* published arrangements of *Offenbach's* music.

The Plaintiffs remonstrated with the Defendant, and threatened proceedings for infringement of their copyright unless some arrangement should be at once made respecting payment of their fees for the right of representation.

The Defendant asserted in reply that "*Vert-Vert*" was not a

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registered opera within the provisions of the *International Copyright Act* (7 Vict. c. 12), stating that if M. *Offenbach* or the Defendants had any legal claim for fees he was prepared to pay them.

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Further correspondence resulted in a refusal by the Defendant to withdraw the piece or the announcement that the music was by *Offenbach*.

On the 29th of May, 1874, the Plaintiffs filed their bill to restrain the Defendant from infringing their copyright and to obtain damages, and they shortly afterwards obtained an interlocutory injunction staying the performance of the English version of "*Vert-Vert*."

It clearly appeared that the music performed by the Defendant was not taken from *Offenbach's* original score. There was some dispute from which of *Soumis'* two published arrangements *Vandenbossche* made out his score, but the Court considered it shewn to have been made from the arrangement for piano and voices.

The cause came on for hearing before Vice-Chancellor *Bacon* on the 18th of May, 1877.

Argument.

Kay, Q.C., *Philbrick*, Q.C., and *T. A. Roberts*, for the Plaintiffs:—

The registration of the 9th of June complies exactly in every particular with the requirements of the *International Copyright Act* (7 Vict. c. 12), s. 6, as to dramatic pieces and musical compositions in MS., and protects the right to the public representation which was assigned to us by *Offenbach*, together with the MS. orchestral score. It can hardly be contended, after *Wood* v. *Boosey* (1), that the pianoforte arrangement, which was the derivative work, is protected by this entry; but the invalid entry of the pianoforte score is mere surplusage, distinct from the entry of the original score, as is shewn by the last column of the register, and in no way invalidates the right of public representation which was assigned to the Plaintiffs by *Offenbach*, and has been duly registered under the provisions of sect. 6; and for the infringement of which by the Defendant the Plaintiffs now sue.

(1) Law Rep. 3 Q. B. 223.

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Argument.

Romer, and *Robert Williams*, for the Defendant:—

The case is virtually decided by *Wood* v. *Boosey* (1), where the entry was of "*Die Lustigen Weiber von Windsor, Komische Oper.* Composed by *Otto Nicolai*, Pianoforte Score;" and it was held that as the arrangement for the pianoforte was an independent musical composition, of which *Brissler* and not *Nicolai* (the composer of the opera) was the author, the entry was bad, and gave no title to the Plaintiff, who was precluded by his entry from saying that he had not sought to protect the pianoforte score. So in this case, the Plaintiffs, by the terms of the entry, are seeking to protect something which was first published on the 28th of March, 1869. Now the only thing published on that day was the pianoforte arrangement, of which *Soumis*, and not *Offenbach*, was the author; and accordingly, if what they seek to protect is the pianoforte score, to which alone the Defendant has had recourse, the case is concluded against them by *Wood* v. *Boosey*. If, on the other hand, they are seeking to protect the general score and not the pianoforte arrangement, then they are in a worse position, as it is essential, in order to acquire a title by registration under the Act, that there should be nothing wrong, nothing false, nothing misleading in the entry, and the strictest compliance in all respects with the provisions of the Act is required: *Page* v. *Wisden* (2); *Lowe* v. *Routledge* (3); *Matthieson* v. *Harrod* (4). This entry is false and misleading. It is not true that the general score, as held out by the entry, was published (as distinguished from first representation, the date of which is given) on the 28th of March, 1869, or at all; and this misstatement is enough to put them out of Court. But further, the Plaintiffs seek to restrain the Defendant from infringing the published arrangements, from which alone, both on our evidence and on theirs, has the Defendant taken any part of the music. In respect of those arrangements there is absolutely no copyright in this country; anybody may print, anybody may use them.

Kay, in reply:—

In *Wood* v. *Boosey* the description on the register of the thing sought to be protected was of a "pianoforte score." Here the

(1) Law Rep. 3 Q. B. 223.
(2) 17 W. R. 483.
(3) 33 L. J. (Ch.) 717.
(4) Law Rep. 7 Eq. 270.

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registration is of the MS. of the comic opera of which *Offenbach*, and not *Soumis*, was the composer, and of the right of representing and playing that opera. We admit that the statement of first publication, on the 28th of March, 1869, was inaccurate, as *Offenbach's* MS. has never been published, and *Soumis'* name ought to have been given as the author of the arrangement actually published. But how does that affect our sole right of public representation, which was assigned to us by *Offenbach*, and is what was claimed by the entry? If any one was misled, it was not the Defendant, for he states in his evidence that he took the published book and made up his opera from it. *Page* v. *Wisden* (1) and the other cases cited, where false statements were held to vitiate the entry, do not apply to an entry like this, where something unnecessary has been wrongly stated.

Judgment, V.-C. B.

BACON, V.C.:—

The case depends wholly on the statute (7 Vict. c. 12), which alone expresses what is the law on this subject. If I had to consider what may be called the merits of the case, of course I might very likely take a view wholly different from that which the Defendant has urged, but I am not at liberty to do so. The Act of Parliament requires, as an essential condition to the acquisition of a copyright in the case of a printed thing, or to secure the exclusive right of representing a musical composition which remains in manuscript, that that should be registered in the way mentioned by the statute. Those are the conditions on which alone a copyright can be acquired.

In this case the thing for which copyright is claimed is called "'*Vert-Vert*,' *Opéra Comique*," and so on, "Music by *Offenbach*." Passing by the next two columns, which only describe the authorship of the book and the property in it, the next thing I find is that the 28th of March, 1869, and the place mentioned, are given as the time and place of the first publication. The first publication of what? Of an opera the words of which are written by the authors there mentioned, and the music of which is by *Offenbach*. But that is not all, because at the same time, by a positive act, a book answering that description is deposited with the regis-

(1) 17 W. R. 483.

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Judgment, V.-C. B.

trar at *Stationers' Hall*, and there is no question that that, and that only, is the thing registered.

But then it is said there is, besides, another thing claimed by this entry, viz., the right of representation, of which *Offenbach* is said to be sole proprietor, and which first took place on the 10th of March, 1869. But there are no two things claimed by this registration. If *Offenbach* had claimed in the words of the statute, being the owner of an unpublished manuscript, the sole right of representation, and that had been properly entered, that, no doubt, would have given him the right which the statute confers and no more. He has done no such thing; he has claimed nothing but a printed book, which he exhibits at the time when the entry is made, which he deposits that it may be referred to for all purposes, and then says that the first representation was on the 10th of March, 1869. That is no registration. The book was a book of which *Soumis* was the author. That is the thing for which copyright is claimed, and there is no other.

It is admitted that the entry is erroneous so far as relates to the book, and therefore there can be no right acquired by the person entering, nor by the assignee of that person, and yet that is the only thing this Defendant has used. He has not interfered with any right which *Offenbach* has. *Offenbach* may, perhaps, now register the sole right of representation. Whether the time has elapsed during which that could be done it is not necessary to inquire. But what the Defendant has done has been to avail himself of a publication referred to in the registry, but not expressed in such terms as would give any exclusive right. That printed book, and that alone, has he resorted to. [His Lordship here referred to the evidence.] If, then, the entry is erroneous, so that no copyright could be obtained in it, and all that the Defendant has done has been to avail himself of that book which has no protection, how can I say he has infringed anybody's rights? It may have been the intention of *Offenbach* when he made this entry, or when somebody made it for him, to have claimed also the sole right of representation. But then they could not claim that sole right by an entry of music, of which, as the adapter and arranger for the pianoforte, *Soumis* was the author, when that to which the sole right of representation would refer, and which they were

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entitled to register, was an unpublished manuscript. I think *Wood* v. *Boosey* (1) covers it (and indeed it is not disputed) as to the first point, that the entry is erroneous. If it is erroneous, no right is acquired by it, and if no right is acquired by it, all the Defendant has done has been perfectly justifiable. If there were no statute he would have been at liberty by the exercise of his memory—and some people have been so gifted—to recollect the notes of the airs, and perhaps more than the airs, the choruses and other things, and to have written them in music, and have had them sung and performed at his own instance. Indeed there is a very remarkable instance in the history of the theatre, when *Beaumarchais'* plays were exciting so much popularity in *France*. An English dramatist who happened to be in *France*, with the help of his friend, took down—not in shorthand, for they could not write that, but took down—in their memories the scenes in the "*Mariage de Figaro*," and went out at the end of each scene or act and transcribed it, so that within a short period after the public representation of that play in *Paris*, the "*Marriage of Figaro*" was brought out on the English stage, no line of it having been printed, and no manuscript ever having been furnished to them. I say if there was no statute that might be done by anybody with *Offenbach's* music. If *Offenbach* desires to have the benefit of this statute, he must comply with the requisitions of the statute. He has registered a publication which is quite different from his own original manuscript, and the entry being totally silent on the subject of his manuscript, the reference being direct to *Soumis'* print, no copyright was acquired, and therefore there is no ground on which this suit by Messrs. *Boosey*, who are the assignees of that unpublished manuscript, can possibly be sustained in this Court. The bill must be dismissed with costs.

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The Plaintiffs appealed. The appeal was heard on the 19th and 20th of November.

C. A.

Kay, Q.C., *Philbrick*, Q.C., and *T. A. Roberts*, for the Plaintiffs:—

Argument.

The thing which the registration was intended to protect was the right of publicly performing the music. If it had been printed

(1) Law Rep. 3 Q. B. 223.

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it would have been necessary to deposit a copy of the print, but it never was printed. The entry, by mentioning the date of publication, impliedly states that it was printed, which was erroneous; but this could not mislead any one, and an error of this nature cannot affect a registration otherwise perfect. It is urged that the Defendant has only made use of *Soumis'* published arrangements in which there is no copyright; but if, because a pianoforte arrangement is not copyright, any one may make out a score from it and publicly perform the opera from such score, the protection which the Act intended to give to musical compositions will be to a great extent destroyed.

Romer, and *Robert Williams*, for the Defendant:—

We say, first, that it is necessary not only to have the work registered but to deposit in certain public libraries a copy of the work so far as it is printed: Convention with *France*, Art. 8, given in *Phillips* on Copyright (1). The parts which were published in August, 1869, ought therefore to have been deposited.

[JAMES, L.J.:—If you allege that a Plaintiff has lost his right by conduct subsequent to the accruer of his right, you ought to plead it.]

We could not do so, for it was not within our knowledge till it came out on the Plaintiff's evidence. Then we say the entry was misleading. *Fairlie* searched, and went away with the impression that it was not intended to register anything but *Soumis'* arrangement. The Plaintiffs make an entry pointing at that book, and they deposit a copy of it; this shews the scope of the registration. The first words of the entry might be sufficient to protect the score, but they are controlled by the subsequent parts. The MS. then is not protected. But suppose it is protected, there is, as the Plaintiffs admit, no protection for *Soumis'* arrangement, and that is the only thing the Defendant has used. The statute 7 Vict. c. 12, s. 6, allows fair imitations and adaptations, and this was one. Then an assignment in writing of the copyright is necessary: *Leyland* v. *Stewart* (2); and none has been proved.

Kay, in reply.

(1) Page 250. (2) 4 Ch. D. 419.

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Dec. 14. THESIGER, L.J., now delivered the judgment of the Court (*James, Baggallay,* and *Thesiger,* L.JJ.):—

The Plaintiffs in this appeal claim, as assignees from the French composer *Offenbach,* to be entitled to the sole right of publicly performing the music of an *opéra bouffe* or *comique* called "*Vert-Vert,*" and to restrain by injunction the continuance of, and to obtain compensation in damages for, an alleged infringement of that right on the part of the Defendant, under the following circumstances:—At some time prior to the 10th of March, 1869, *Offenbach* composed and wrote in *France* the full score of the opera in question, the libretto for it being furnished by Messrs. *Meilhac* and *Nuitter,* and the opera so composed was performed for the first time upon the 10th of March, 1869, at the *Théâtre Impérial de l'Opéra Comique,* in *Paris.* On the 28th of March, 1869, there was printed and published for sale in *France* an arrangement for the piano of the music of the opera, the arranger being a person of the name of *Soumis,* and the book containing such arrangement having upon its title-page the following title:—"*Vert-Vert, Opéra Comique, en trois actes. Paroles de MM. Meilhac et Nuitter; musique de J. Offenbach. Partition pour piano seul arrangée par L. Soumis.*" At some date prior to the 9th of June, 1869, there was also printed and published for sale in *France* another arrangement by *Soumis* of the music of the opera for piano with voices, and with the insertion at the commencement of the overture and in other places of the names of certain musical instruments, which, if the pianoforte arrangement were to be converted into a full operatic score, would afford some indication of the instruments to be used. The title of the latter arrangement was the same as that of the former, with the exception that in lieu of the words "*partition pour piano seul*" were used the words "*partition chant et piano.*" On the 9th of June, 1869, in alleged pursuance of the provisions of 7 Vict. c. 12, and with the view of obtaining the benefit of that Act and of the convention founded upon it made between this country and *France* on the 3rd of November, 1851, an entry, a copy of which is to be found at page 3 of the Plaintiffs' bill of complaint, was made in the book of registry kept at *Stationers' Hall* under the Act, and on the same day a subsequent entry of assignment to the Plaintiffs was

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made, a copy of which is to be found at page 4 of the bill. The first entry gave the "title of book" as "*Vert-Vert, Opéra Comique, en trois actes. Paroles de MM. H. Meilhac et Nuitter; musique de J. Offenbach,*" the "name of author or composer" as "*J. Offenbach,*" adding his place of abode; the name of the proprietor of the copyright as "*J. Offenbach,*" adding his place of abode, and that he was the "proprietor of the copyright in the music and of the right of publicly performing such music;" the "time of first publication" as the 28th of March, 1869, adding the place; and the "time and place of first representation" as the "*Opéra Comique, Paris,* on the 10th of March, 1869." Contemporaneously with these entries there was delivered to the office of the *Company of Stationers* a book containing the first-mentioned arrangement for the piano by *Soumis.* On the 9th of August, 1869, four of the orchestral parts of the opera as composed by *Offenbach*—viz., the parts for first and second violins and tenor, and the part for violoncello and contrabasso—were printed and published for sale in *Paris,* and, with that exception, the full score of the opera, containing the whole of the parts for the voices and for the various instruments of the orchestra, remained at the time of the filing of the bill in manuscript. About the month of April, 1874, the Defendant, who was then the manager of the *St. James's Theatre,* in *London,* having determined to produce an *opéra bouffe* at that theatre, applied to a Mr. *Richard Mansell* for his aid in the matter, and being informed by him that an *opéra comique,* founded upon an old French novel entitled "*Vert-Vert,*" had been composed by *Offenbach,* and that there was no existing copyright in the opera, employed *Mansell* and a Mr. *Herman* to write for him the libretto for an *opéra bouffe* founded upon the said French novel. The libretto was accordingly written by *Mansell* and *Herman,* who also, with the assistance of the musical director employed by the Defendant, arranged the music for the libretto, and such music, as stated by the Defendant in his affidavit, consisted of portions of the said *opéra comique* by *Offenbach,* together with portions of other operas by other composers. The evidence, in fact, establishes that a substantial and material part of *Offenbach's* music was taken, and that for that purpose *Soumis'* arrangement for piano with voices was made use of.

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Advertisements were then inserted by the Defendant in various *London* newspapers, announcing that an *opéra bouffe*, entitled "*Vert-Vert*," written by Messrs. *Herman* and *Mansell*, music by *Offenbach*, would be produced at the *St. James's Theatre* on the 2nd of May, 1874, and on that day and for some time subsequently the opera, as advertised, was performed.

In this state of facts the Plaintiffs filed their bill of complaint, which, as amended, was dismissed by the learned Vice Chancellor, mainly on the ground that what had been registered was not *Offenbach's* manuscript score, but the arrangement by *Soumis* of the music of the opera for pianoforte alone, and that the registration was invalid, according to the authority of *Wood* v. *Boosey* (1), in consequence of the name of *Offenbach*, and not that of *Soumis*, being entered as the composer and proprietor of that arrangement.

The argument for the Defendant upon this point rests upon the fact that in the last column of the book of registry, under the heading "Time and place of first publication," the date of the 28th of March, 1869, is entered, being the date of the publication of the arrangement by *Soumis*, a copy of which was deposited contemporaneously with the entry; and it is contended that either the thing registered was the arrangement by *Soumis*, in which case the registration was invalid according to *Wood* v. *Boosey*, or at least the entries were so misleading that the registration ought to be held invalid. The Plaintiffs, on the other hand, while admitting that the arrangement by *Soumis* is not protected, point to the heading, also in the last column of the register, entitled "Time and place of first representation," under which is entered the date of the 10th of March, 1869, being the date of the first representation of *Offenbach's* manuscript opera, and contend that the entries in all the preceding columns are applicable to that opera, rather than to *Soumis'* arrangement, and form a complete set of entries sufficient to protect and clear enough to inform everybody reading them that they were intended to protect the right of representing the opera in this country, and further contend that the protection attributable to entries so complete and clear ought not to be invalidated by reason of the making of an additional entry, which, upon their hypothesis, was an unnecessary act.

(1) Law Rep. 3 Q. B. 223.

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We are of opinion that the contention of the Plaintiffs ought to prevail. The provisions in regard to registration of a foreign dramatic piece or musical composition are contained in 7 Vict. c. 12, s. 6, and require that, in the event of such piece or composition being printed, the title to the copy, the name and place of abode of the author or composer, the name and place of abode of the proprietor of the copyright, and the time and place of the first publication, representation, or performance, as the case may be, in the foreign country shall be entered in the register, and that one printed copy of such piece or composition shall be delivered to the officer of the *Company of Stationers*. If the dramatic piece or musical composition be in manuscript, all that is required is that the title, the name, and place of abode of the author or composer, the name and place of abode of the proprietor of the right of performing or representing, and the time and place of the first representation or performance in the foreign country shall be entered in the register. The task of making and also of construing the statutable entries in this and similar cases is rendered somewhat difficult owing to the circumstances—first, that the statute does not require or the book of registry in form provide for any description of the thing intended to be registered apart from its title, although the subject-matter of registration under sect. 6 of 7 Vict. c. 12, includes books, prints, articles of sculpture, and other works of art, as well as dramatic pieces and musical compositions; and, secondly, that the register in its actual form is framed with headings applicable only to the registration of a book or other printed matter; and, while we are bound, without any reference to hardship or other extraneous considerations, to see that the provisions of the *Registration Act*, however technical and minute they may be, are literally complied with, we ought at the same time to be careful that we do not ourselves create difficulties or impose obligations beyond those which by express enactment persons registering have respectively to meet and sustain. Taking then the entries in the present case, as given at page 3 of the bill, and confining our attention first to the second, third, and fourth columns, it seems to us clear that what is intended to be registered is the opera of *Offenbach*, and not the book containing the pianoforte arrangement of *Soumis*. In the

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second column, headed "Title of book," instead of finding, as was the case in *Wood* v. *Boosey* (1), the words "pianoforte score," or any words pointing to *Soumis'* arrangement for the piano, we find the words "*Vert-Vert, opéra comique*," followed (after reference to the libretto) by the words "*Musique de J. Offenbach.*" In the third column we find the name of *Offenbach* entered as that of the composer, and in the fourth column the same name as that of the proprietor of the copyright in the music (*i.e.*, the music of *J. Offenbach* in the second column mentioned), and of the right of publicly performing such music. We then come to the last column, where we find, under the heading "Time and place of first representation," the entry "*Théâtre Impérial de l'Opéra Comique, Paris, France*, March 10, 1869," being an entry solely relating to the opera composed by *Offenbach*, and having no connection whatever with the pianoforte score by *Soumis*. The entries, therefore, to this point are not only both consistent with the fact of the thing registered being the opera of *Offenbach*, as composed and written by him, and also complete for the purpose of protecting the sole right of performing it, but appear to us utterly inconsistent with the notion that *Soumis'* arrangement for the piano was the thing to be registered; and, that being so, it seems to us unreasonable to attribute to the entry in the last column of the date 28th of March, even when coupled with the deposit of the book containing *Soumis'* arrangement for the piano, such force as to override the entry relating to the opera in the same column which, as containing the earlier date, is, *primâ facie*, the more important one, and to convert the whole of the preceding entries, which *per se* are in their terms applicable to the opera, into an attempted, and, as it is now admitted, invalid, registration simply of the pianoforte arrangement.

We are of opinion, therefore, that the music of *Offenbach's* opera, and not the pianoforte arrangement, is the thing primarily intended to be registered, and we come to the question whether the additional entry referring to *Soumis'* arrangement, and the deposit of the book containing that arrangement, ought to be held to invalidate the protection which would otherwise have been obtained of the sole right of performing the opera. In making the entry

(1) Law Rep. 3 Q. B. 223.

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and depositing the book, the person concerned in the registration may have been actuated either by a notion that the terms of the statute or the convention possibly necessitated a reference to the publication and the deposit of the pianoforte score, or by a desire to acquire a copyright in that score, as well as the right of performing *Offenbach's* manuscript opera. But, whatever was the reason prompting the acts, we have had cited to us no authority, and we can find nothing in the statute under which the registration is made, which would bind or even entitle us to say that those acts have rendered invalid a registration of the opera in all other respects complete.

The tendency, probable or possible, of the superfluous entry and unnecessary deposit to mislead, is a topic which of course may be and has been properly urged upon us in argument, but such topic has, in our opinion, too much that is speculative and uncertain in it to be allowed to outweigh the argument founded upon the compliance, so far as the right of dramatic representation is concerned, with the provisions of the *Registration Act*.

Assuming the original registration of proprietorship to be valid, it has been urged on behalf of the Defendant—first, that under the convention of 1851 the protection given by the registration became subsequently inoperative, in consequence of the Plaintiffs not having delivered to the officer of the *Stationers' Company* a copy of the four instrumental parts published on the 9th of August, 1869; secondly, that the Plaintiffs have given no sufficient proof of the assignment by *Offenbach* to them; and, thirdly, that the performance of an opera, the music of which, although in great part that of *Offenbach's* opera, had been taken from the unprotected arrangement of *Soumis*, did not constitute an infringement of the Plaintiffs' rights. Upon all these points we are of opinion that the Defendant has failed to make out a good defence to the bill. Upon the first point it is unnecessary to decide whether, supposing a dramatic piece or musical composition in manuscript to have been registered so as to give protection to the right of representing it or performing it, the subsequent printing and publication of such piece or composition, if not followed by the deposit of a copy at *Stationers' Hall*, can be held to take away that right, for in the present case it appears to us that the pub-

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lication of the four instrumental parts does not constitute a publication of *Offenbach's* opera within the meaning either of the convention or of the statute under which that convention was made. Upon the second point it appears that a copy of the registered entry of the assignment, certified under the hand of the officer of the *Stationers' Company*, and impressed with the stamp of the company, has been put in evidence. Such copy constitutes *primâ facie* evidence of the assignment, although subject to be rebutted by other evidence (see sects. 11 and 13 of 5 & 6 Vict. c. 45, and sect. 8 of 7 Vict. c. 12), and, inasmuch as in this case no rebutting evidence has been given, the proof of the assignment is complete.

Upon the third point, viz., that of infringement, we are of opinion that a dramatic representation in which a substantial and material part of the music of *Offenbach's* opera has been performed constitutes an infringement of the sole right of performing that music, even though the operatic score may have been obtained by independent labour bestowed upon the unprotected pianoforte arrangement of *Soumis*. There is scarcely any popular opera the score of which is not, within a short time after its first performance, arranged for the piano, and if by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory. During the argument no authority was cited to us upon this point, but the cases of *Reade* v. *Lacy* (1) and *Reade* v. *Conquest* (2) seem to have decided the very point in conformity with the view we have expressed. There Mr. *Reade*, the author, had written and obtained copyright in a drama called *Gold*, and had subsequently written a novel called *Never too late to Mend*, founded on and incorporating a considerable part of the dialogue of the drama, in which novel he had also obtained copyright. The novel was dramatised by the application of independent labour, and without any knowledge of Mr. *Reade's* own drama, and, so dramatised, was represented on the stage; and although, as appears from the report in the Common Pleas, these actions were held in that

(1) 1 J. & H. 524. (2) 11 C. B. (N.S.) 479.

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Court not to be an infringement of the copyright in the novel, and, for the purposes of argument, the Vice-Chancellor, in *Reade* v. *Lacy* (1), assumed them not to be an infringement of it, yet they were in both Courts held to be an infringement of Mr. *Reade's* sole right of representing his drama. The appeal must therefore be allowed, and an injunction granted in the terms of the prayer of the bill.

Solicitors: *R. G. Marsden; E. Johnson.*

C. A. 1877 V.-C. B. *Nov.* 15. C. A. *Dec.* 21.

PILCHER *v.* ARDEN. *In re* BROOK.

[1871 P. 54.]

*Solicitor—Lien for Costs—Charging Order—*23 & 24 *Vict. c.* 127, *s.* 28.

By an order made in an administration suit, the costs were ordered to be taxed, and the Plaintiff's costs to be paid to his solicitor, *B.*, out of a specified fund in Court. Before the costs had been taxed the Plaintiff obtained an order to change his solicitor, and *B.* no longer acted for any party in the suit:—

Held, that *B.* was entitled to a charging order, under 23 & 24 Vict. c. 127, upon the interest of his client in the funds in Court, notwithstanding the prior order for payment out of a certain specified fund; but that such order ought not to extend to directing a sale, but must be limited to giving the parties liberty to apply. The fact that the Plaintiff had in the meantime assigned his interest with the knowledge of *B.* made no difference.

The order of *Bacon*, V.C., varied.

Held, also, by *Bacon*, V.C., that *B.* had a right to retain the papers in the suit till his costs were paid.

Statement.

THIS suit was commenced in 1871 for the administration of the estate of *Jeremiah Pilcher*, and a decree directing inquiries was made, and certain funds ordered to be brought into Court. The Plaintiff, *Arthur Pilcher*, was entitled to a life interest in a portion of the estate. Mr. *Brook* acted as his solicitor in the cause.

On the 23rd of July, 1875, by the order on further consideration, it was ordered, among other things, that the costs of all parties should be taxed, and that the costs of the Plaintiff should be paid out of certain of the funds in Court therein mentioned to

(1) 1 J. & H. 524.

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Mr. *Brook;* and further consideration was reserved, with liberty to all parties to apply.

By a further order on the 7th of May, 1877, after stating that the costs of the suit had not then been taxed, it was ordered that the subsequent costs of all parties should be taxed and paid out of the funds mentioned in the former order, and if they were not sufficient, then out of certain other funds therein mentioned, and any of the parties were to be at liberty to apply in Chambers as to raising and paying the residue of such costs as they might be advised.

Statement.

On the 11th of July, 1876, the Plaintiff assigned his life interest in certain property, including the funds in Court in the suit, to the *Law Reversionary Interest Society.*

On the 17th of July, 1877, the Plaintiff obtained an order to change his solicitor, and Mr. *Brook* no longer acted for any party in the cause. He now applied by summons in Chambers for an order, under 23 & 24 Vict. c. 127, s. 28, charging the Plaintiff's life interest in the funds in Court with his costs. The *Law Reversionary Interest Society* filed an affidavit, in which they stated that Mr. *Brook* had notice of the assignment of the Plaintiff's interest while it was being negotiated, and made no objection to it.

Another summons was taken out by the Plaintiff to compel Mr. *Brook* to give up the papers in the suit. The two summonses were adjourned into Court and came on to be heard together before Vice-Chancellor *Bacon* on the 15th of November, 1877.

Argument.

Sir *H. Jackson*, Q.C., and *Byrne*, for Mr. *Brook*, on the first summons asked for an order in the form given in *Twynam* v. *Porter* (1). They cited *Haynes* v. *Cooper* (2); *In re Fiddey* (3). On the second summons they referred to *In re Faithfull* (4); *Robins* v. *Goldingham* (5).

Langworthy, for the *Law Reversionary Interest Society*, in opposition to the first summons, referred to *Ex parte Thompson* (6); *Hicks* v. *Keate* (7).

(1) Law Rep. 11 Eq. 188.
(2) 33 Beav. 431.
(3) Law Rep. 7 Ch. 773.
(4) Law Rep. 6 Eq. 325.
(5) Ibid. 13 Eq. 440.
(6) 3 L. T. (N.S.) 317.
(7) 3 Jur. 1024.

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Buckley, for the Plaintiff, also in opposition to the first summons, referred to *De Bay* v. *Griffin* (1) and *Hobson* v. *Shearwood* (2). In support of the second summons he relied on the special circumstances of the case, Mr. *Brook* having delivered no bill and taken no steps to have his costs taxed although two years and a half had elapsed since the order was made.

Sir *H. Jackson*, in reply.

Judgment, V.-C. B.

BACON, V.C.:—

With respect to the second summons, I think it is bound by authority. I cannot see that it makes any difference that no bill has been delivered. A client can at any time have a bill whenever he likes to apply for it. There is no ground on which this summons can be supported, the solicitor having been discharged by his client.

As to the other summons, I am of opinion that the case comes clearly within the 28th section of 23 & 24 Vict. c. 127. No doubt there was an order for taxation of costs, and for payment of the costs out of a fund which was sufficient for this payment. But the statute has given to the solicitor a right to call for a charge whenever he thinks fit for the taxed costs, charges, and expenses of or in reference to the suit, matter, or proceeding. Nothing can be said against such an enactment as this, but by a purchaser for valuable consideration without notice. In this instance the *Reversionary Society* had full notice. Therefore the circumstance of this purchase having been made does not impeach the right of the solicitor to have his charge. Although I am not bound, it is true, by the decision in *Twynam* v. *Porter* (3), which has been cited to me, I am very willing to be guided by it. This is not a question of propriety, it is a question of whether the inherent right of the solicitor to have a charge for his costs is to prevail over that of a purchaser.

The order must be similar to that which was made in *Twynam* v. *Porter*, directing that the amount of the costs when taxed shall

(1) Law Rep. 10 Ch. 291. (2) 8 Beav. 486.
(3) Law Rep. 11 Eq. 188.

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be raised by a sale, with the approbation of the Judge, of the Plaintiff's interest.

From this decision the *Law Reversionary Interest Society* appealed. The appeal was heard on the the 21st of December.

C. A. Argument.

Bristowe, Q.C., and *Langworthy*, for the Appellants:—

It was decided in *In re Viney's Trust* (1) that where costs in a suit have been ordered to be paid to a solicitor personally out of a fund in Court, he cannot afterwards obtain a charging order under the Act on his client's interest. In the present case there would be a great hardship if it were permitted, because the solicitor might proceed under the terms of the order appealed from to sell the life interest of the Plaintiff, although under the order on further consideration the capital of a special fund was appointed for the purpose. The solicitor ought to bring in his bill to be taxed, and proceed under that order. We also contend that Mr. *Brook* is barred by his acquiescence in the assignment at the time when it was made.

Sir *H. Jackson*, Q.C. and *Byrne*, for Mr. *Brook*:—

The distinction between this case and *In re Viney's Trust* is that in that case the solicitor was still the solicitor in the cause, but Mr. *Brook* has been discharged, and therefore he cannot enforce the order on further consideration. He was no longer engaged for any of the parties, and as the liberty to apply is only reserved to the parties, Mr. *Brook* cannot take out a warrant before the Taxing Master. His only course is to take independent proceedings against his former client: *In re Fiddey* (2); *Twynam* v. *Porter* (3).

Bristowe, in reply.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I have ascertained by inquiry from the Taxing Master that in a case like the present the solicitor, not being engaged for any party

(1) 18 L. T. (N.S.) 853. (2) Law Rep. 7 Ch. 773.
(3) Law Rep. 11 Eq. 181.

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to the cause, would have no right to take out a warrant to enforce the order for taxation. It is therefore reasonable that he should be allowed to obtain an order under the statute. But the order must be varied by striking out the direction that the amount should be raised by sale with the approbation of the Judge, and inserting in its place a direction that either party may be at liberty to apply to the Judge with reference to enforcing the charge by sale or otherwise. There will be no costs of the appeal.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Capron & Co.; W. B. Brook.*

C. A. 1877 V.-C. B. May 29. C. A. Dec. 8.

MORTIMER *v.* SLATER.

[1876 M. 336.]

Will—Next of Kin according to the Statute of Distributions—Time of ascertaining Class.

A testator gave one fourth of a fund to one of his four daughters by name for life, and after her death to her children then living, but if she left no child, then he directed that the interest should be paid to his other daughters then living and the survivors and survivor of them, and after the decease of the last survivor he directed the same fourth share to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statutes for the Distribution of Intestates' Estates." He declared similar trusts of the other fourth shares respectively in favour of his other three daughters respectively and their respective children, with the same ultimate limitations. One daughter died after the testator, leaving children; the other three afterwards died without issue:—

Held, by *Bacon*, V.C., that the class of next of kin was to be ascertained at the death of the last surviving daughter.

Held, on appeal, that the class was to be ascertained at the death of the testator; and that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters.

Statement.

JOHN CLARKE, by will dated in 1825, bequeathed to trustees £12,000 consols upon trust as to £3000 consols, part thereof, to pay the income to his daughter *Sarah G. Clarke* during her life, for her sole and separate use without power of anticipation,

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and after her death, if she should have married and leave issue, upon trust to divide such £3000 consols among her children living at her decease, and if she should have but one child, then to such only child, with powers of maintenance. The will then proceeded:—

"And in case my said daughter *Sarah G. Clarke* shall die without leaving issue her surviving, then I will and direct that the interest and dividends of the said sum of £3000 consols be paid and divided to and among such of my said other daughters as shall then be living and to the survivor and survivors whether single or married, but to and for their sole and separate use and benefit. And from and immediately after the decease of my last surviving daughter, that the said sum of £3000 consols be paid and divided to and among the child or children, if any, of such last surviving daughter; or, if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates."

There followed precisely similar trusts of £3000 consols, further part of the £12,000, for his daughter *Rebecca Clarke* and her children, with the same limitation in default of children. Another £3000 was given upon like trusts for his daughter *Mary Clarke* and her children; and the remaining £3000 on like trusts for his daughter *Frances Clarke* and her children, the ultimate limitation over being in each case the same. The residuary estate (subject as to £1000 to a power of appointment given to the testator's wife) was directed to be held on the same trusts as the £12,000 consols.

The testator died in 1838, leaving his four above-mentioned daughters his sole next of kin.

The testator's daughter *Rebecca* married, and died in 1839, leaving children. His daughter *Sarah G. Clarke* died in 1851 a spinster. His daughter *Mary* died in 1872, leaving no issue. *Frances Clarke* died in 1875 a spinster.

At the death of *Frances Clarke* the testator's nearest relation was *Thomas Young*, the only surviving child of the testator's daughter *Rebecca*.

The Plaintiff was the legal personal representative of *Frances*

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Clarke. The Defendants were—the legal personal representatives of *Thomas Young*, and the trustees of the testator's will. The statement of claim asked for a declaration that the persons entitled to the three legacies of £3000 consols primarily bequeathed for the benefit of *Sarah*, *Mary*, and *Frances*, were the testator's next of kin, according to the Statutes of Distribution, living at his death, or the legal personal representatives of such of them as were dead.

The case came on for hearing before Vice-Chancellor *Bacon* on the 29th of May, 1877.

Argument.

W. C. Renshaw (*Kay*, Q.C. with him), for the Plaintiff.

Swanston, Q.C., and *Everitt*, for the representatives of *Thomas Young*.

A. Bailey, for the trustees.

The arguments and authorities were the same as on the appeal.

Judgment. V.-C. B.

BACON, V.C., held that the next of kin were a class to be ascertained at the death of the last surviving daughter, and not at the death of the testator. In *Bullock* v. *Downes* (1), which was a decision upon the words of the particular will, the ultimate gift was unto such person and persons of the blood or next of kin of the testator "as would by virtue of the *Statute of Distributions* have become and been then entitled thereto in case I had died intestate." The time at which the right was to accrue was there plainly and distinctly stated. The period was definitely fixed, and there was no rule of construction which could violate the express words of the testator. In the present case the testator made provision for his four daughters, who were his sole next of kin, during their lives, and, as far as he could, for their issue, and then, upon failure of all his provisions for his daughters and their issue, he made an ultimate bequest "to such person or persons as will then be entitled to receive the same under the *Statute of Distributions*." To hold that these words had reference to the period of the testator's death would be doing violence to the testator's express words,

(1) 9 H. L. C. 1.

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and *Bullock* v. *Downes* (1) could not (in his Lordship's opinion) put any such construction on this will as that contended for by the Plaintiff. In *Bullock* v. *Downes* the testator clearly chose the easily ascertainable period of his own death, but in this case he had clearly chosen a different period, which could only be ascertained after a multitude of unforeseen circumstances had happened —when none of the persons he was seeking to benefit were in existence. The next of kin at the testator's death were the very persons to whom he had already given life interests, and it would be idle to suppose that he intended in this roundabout manner to benefit the very persons for whom he had already specially provided. His Lordship came to the conclusion, though not without hesitation, that what the testator intended was, that when the provisions he had made for his daughters, and, as far as he could, their issue, had failed and could no longer have any effect, when there was no hand to receive them, and not till then was it to be ascertained who was entitled to take under the *Statute of Distributions*.

C. A.

The Plaintiff appealed. The appeal was heard on the 8th of December.

Argument.

Kay, Q.C., and *W. C. Renshaw*, for the Appellant:—

We say that the ultimate gift is to the persons who at the time of the limitation taking effect are the persons entitled, in right of the testator's statutory next of kin at his death. This satisfies the expression "shall be entitled," whereas the Respondents read the ultimate gift as if it had been "who would then have been entitled to receive the same as my next of kin under the statute if I had then died." The case is governed by *Bullock* v. *Downes*; *Cable* v. *Cable* (2); *Wheeler* v. *Addams* (3). The judgment of *Leblanc*, J., in *Doe* v. *Lawson* (4) contains remarks to the same effect. *Day* v. *Day* (5) is very similar to the present case. *Ware* v. *Rowland* (6), *Wharton* v. *Barker* (7), and *Long* v. *Blackall* (8), turn upon particular words which the Court considered to express the intention that the class should be ascertained at the time of

(1) 9 H. L. C. 1.
(2) 16 Beav. 507.
(3) 17 Beav. 417.
(4) 3 East, 278, 292.
(5) 4 L. R. Ir. Eq. Rep. 385.
(6) 2 Ph. 635.
(7) 4 K. & J. 483.
(8) 3 Ves. 486.

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distribution, and which do not occur here. The testator was not contemplating the exhaustion of his daughters' families before the ultimate gift took effect, for, as the preceding limitation is only to the children of the last surviving daughter, it is clear that if the first daughter were to die without issue, then the second and third living children, and then the fourth died without issue, the children of the second and third could only take the shares of the first and fourth under the ultimate limitation. *Seifferth* v. *Badham* (1) shews that the presumption is that a testator in a limitation of this kind is in substance saying that, on the failure of the prior limitations, the law is to take its course.

Swanston, Q.C., and *Everitt*, *contrà*:—

Taking the words of the will in their obvious natural sense, the order appealed from is clearly right. The fact referred to by the Appellant, that the limitation preceding the ultimate gift is only in favour of the children of the surviving daughter, is in our favour, for, on the Appellant's construction, a daughter's children born after the testator's death could not take anything unless their mother became the last survivor. We contend that this case falls within the class of cases of which *Wharton* v. *Barker* (2) is a type, and not within *Bullock* v. *Downes* (3) and cases of that class. The authorities shew that a mere reference to the *Statute of Distributions* does not make the death of the testator the period for ascertaining the class of next of kin, and it will be found that in all the cases relied on by the Appellant there has been an express reference to the *propositus* dying intestate. This, we submit, is necessary. Thus, in *Long* v. *Blackall* (4), recognised in *Holloway* v. *Holloway* (5) the class was ascertained at the period of distribution; and so in *Briden* v. *Hewlett* (6), which is very like the present case, *Butler* v. *Bushnell* (7) and *Clapton* v. *Bulmer* (8). In *Doe* v. *Lawson* (9) there was a reference to dying intestate. In *Ware* v. *Rowland* (10) and *Cable* v. *Cable* (11) "then" was not an

(1) 9 Beav. 370.
(2) 4 K. & J. 483.
(3) 9 H. L. C. 1.
(4) 3 Ves. 486.
(5) 5 Ves. 399.
(6) 2 My. & K. 90.
(7) 3 My. & K. 232.
(8) 5 My. & Cr. 108.
(9) 3 East, 278.
(10) 2 Ph. 635.
(11) 16 Beav. 507.

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adverb of time, and they therefore do not help the Appellant. In *Wheeler* v. *Adams* (1) there was a reference to intestacy. In *Holloway* v. *Radcliffe* (2) the judgment shews that on a will like the present the Master of the Rolls would have decided as the Vice-Chancellor has done. In *Wharton* v. *Barker* (3), as here, there was no reference to dying intestate, and the class was ascertained at the time of distribution. In *Bullock* v. *Downes* (4) "then" was not an adverb of time, and there was a reference to dying intestate, which was expressly made the *ratio decidendi* at the Rolls (5). *In re Morley's Trust* (6) is very close on the present case, and is in our favour.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am not able at all to take the same view as the Vice-Chancellor has taken in this case. If authority were needed, which I think it is not, the case appears to me incapable of being distinguished from *Bullock* v. *Downes*, which, having been decided by the House of Lords, is of course binding upon us.

The words are, "the same shall be paid to such persons as will then be entitled," that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute. That was the *ratio decidendi* in *Bullock* v. *Downes*. It appears to me to be plain that to satisfy that expression you must have a person who can shew a title under the *Statute of Distributions*, and the only persons who can shew a title under the *Statute of Distributions* are the persons who were next of kin at the death of the testator (who was partially intestate) or the persons who represent them.

With regard to what is the plain meaning and intention of this testator according to the common-sense meaning of his language, I agree with the Vice-Chancellor's premises, but I am unable to agree with the conclusion which he has drawn from them. The Vice-Chancellor considered that the testator meant to say in

(1) 17 Beav. 417.
(2) 23 Beav. 163.
(3) 4 K. & J. 483.
(4) 9 H. L. C. 1.
(5) 25 Beav. 54.
(6) 25 W. R. 825.

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substance, "I provide for my daughters, and, as far as I can, for their issue, and when none of the persons I am seeking to provide for are any longer in existence, then, and not till then, all my provisions having failed by death, let my property go and be distributed according to the *Statute of Distributions*. I have made every provision which I think it necessary to make, and when all these fail let the law distribute the property." That, as it seems to me, would be the natural meaning to be given to the will without reference to authorities. But on the authorities I think we are bound to say that when the words are that the fund is to be paid "to such persons as will then be entitled to receive the same as my next of kin under the *Statute of Distributions*," the claimants must shew an actual title under the *Statute of Distributions*.

I am of opinion, therefore, that the order of the Vice-Chancellor must be discharged, and an order substituted for it declaring the title of the persons who were next of kin at the death of the testator.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. It is of rare occurrence to find a case so completely on all fours with another case as is the present case with the case of *Bullock* v. *Downes* (1). In this case the consols are to be paid on the decease of the surviving daughter to such person or persons as shall be entitled to receive the same under the statute. In the case of *Bullock* v. *Downes*, in like manner, the trustee was to stand possessed of the trust property in trust for such person or persons as would by virtue of the *Statute of Distributions* have become entitled thereto at the time of the death of the testator's son in case the testator had died intestate. The words are equivalent. It has been suggested that the case of *Wharton* v. *Barker* (2), which was decided before *Bullock* v. *Downes*, proceeded on a distinction which is to be found in the present case, but I do not find that it went on any such ground. The Vice-Chancellor in that case says that (3) "neither the circumstance of there being a previous bequest for life or other limited period,

(1) 9 H. L. C. 1. (2) 4 K. & J. 483.
(3) 4 K. & J. 489.

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nor the circumstance of the person to whom that previous bequest is made being also one of the next of kin of the testator at the time of his death, will prevent the Court from holding that the time at which the class is to be ascertained is the time of the testator's death, and not that fixed by the will as the period for distribution. Such being the general rules, their application can only be prevented by a clear indication in the will, that, in the particular limitation in question the testator did not intend them to be applied. For this purpose the intention must be shewn in language clear and unambiguous. Mere words of futurity are insufficient. As to this some of the authorities have gone very far. A gift 'to one for life and afterwards to those who shall be my next of kin (and not who *then* shall be my next of kin)' has been held not to be sufficiently clear and unambiguous to prevent the rule from applying." The Vice-Chancellor then went into the consideration of the particular words which he found in that case, and was of opinion that they did clearly and distinctly point to another period as the period at which the class was to be ascertained.

Judgment, C. A. Baggallay, L.J.

THESIGER, L.J.:—

Thesiger, L.J.

I am of the same opinion both upon the authority of the cases cited and also upon my own independent view as to the meaning of the clause which we have to construe.

The cases which have been cited seem to me to divide themselves into three classes.

The first of these classes is the one where the word "then," the adverb of time, is attached to the description of the class, and in that case, as in *Wharton* v. *Barker* (1) and *Long* v. *Blackall* (2), it was decided that the word "then" imported that the class was to be ascertained at the time so pointed out, *i.e.*, at the period of distribution. *Wheeler* v. *Addams* (3) is to a certain extent an exception from that rule, but I think that may be explained, because we find in that case there is in the limitation an exception of the tenant for life on whose death the limitation was to come into force. This shewed that the class must be ascertained at an

(1) 4 K. & J. 483. (2) 3 Ves. 486.
(3) 17 Beav. 417.

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earlier period than his death. Now that is the only class of cases on which reliance can be placed on behalf of those who support the Vice-Chancellor's decision.

The second class of cases is where words of futurity, but without the adverb of time, are attached to the description of the class, and in that class of cases we find no distinction drawn, but in every one of them it was held that there the words must speak from the time of the testator's death. The cases cited on that point were *Holloway* v. *Holloway* (1) and *Doe* v. *Lawson* (2).

The third class of cases is where the word "then," the adverb of time, is used, but where we find it used, not in connection with the description of the class, but in connection with the time at which the estate is to come into being. In that class of cases also, without any exception, we find that it has been decided that the class is to be ascertained at the time of the testator's death. That is to be found in *Cable* v. *Cable* (3), *Bullock* v. *Downes* (4), and in *Day* v. *Day* (5); and it is to be observed that in all these cases we do not find that any distinction is drawn from the fact of the use of the words "if he had died intestate," as has been argued by Mr. *Swanston*, but we find in all of them that the learned Judges who decided them considered the question to be whether the word "then" was attached to the description of the class or to the time when the estate is to come into being.

Now, that being the state of the authorities, there can, as it seems to me, be no doubt that this case comes within the two latter classes of authorities, for we find that the word "then" is not attached to the description of the class, but is most distinctly attached only to the words which import the time when the estate is to come into being, "to such person or persons as will then be entitled to receive the same." Then follow the words "As my next of kin under the Statute for the Distribution of Intestates' Estates." Those words have been held by themselves in all the cases to import what their natural meaning imports clearly, viz., the next of kin at the time of the testator's death. Therefore it seems to me that the authorities are quite in accord with the

(1) 5 Ves. 399.
(2) 3 East, 278.
(3) 16 Beav. 507.
(4) 9 H. L. C. 1.
(5) 4 L. R. Ir. Eq. Rep. 385.

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natural view of the construction to be put on these words, namely, that after the estates had failed which the testator had previously specifically given by his will, he had left his property to be dealt with as the law would require it to be dealt with if he had made no further disposition.

Solicitors: *C. Langley; Boulton & Sons.*

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M. R.
1877
Nov. 16.

NORTON *v.* FLORENCE LAND AND PUBLIC WORKS COMPANY.

[1877 N. 90.]

Obligation—Bond or Mortgage—Charge on Property in Foreign Country—Jurisdiction of Foreign Court.

A company with an office in *London*, and having house property at *Florence*, raised, under powers in their articles, a sum of money by the issue of "Obligations" payable to bearer, whereby they purported to "bind themselves, their successors and assigns, and all their estate, property, and effects," reserving the right to redeem a certain part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mortgage in the Italian form, registered at *Florence*, the company mortgaged the property to a bank with a *London* office, who had notice of the obligations. The bank having taken proceedings in the tribunal at *Florence* to enforce their mortgage, an action was brought on behalf of the holders of the obligations against the company and the bank, claiming to be mortgagees of the *Florence* property in priority to the bank. On motion to restrain the sale of the property:—

Held, that the obligations were not mortgages, but simply bonds:

Held, also, that even if they created a charge on the company's property, they could not be enforced as against the bank claiming under a registered mortgage at *Florence*; and that, the matter being already before the tribunal of the country where the property was situated, this Court would not interfere.

Statement.

THIS was a motion on behalf of the holders of obligations issued by the *Florence Land and Public Works Company* to restrain the *Anglo-Italian Bank* from selling the company's property at *Florence*, of which they were mortgagees.

The company, whose property consisted partly of land and houses at *Florence*, was registered under the *Companies Act*, 1862, with an office in *London*. By the articles of association it was empowered to issue "debenture bonds" and "mortgage bonds."

In 1868 the company, under the powers of the articles, issued obligations in the following form:—

"Obligation.

"Total issue, £250,000.

"No. . "£100.

"The *Florence Land and Public Works Company, Limited*, in

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consideration of the sum of £100 advanced and lent to them by , do hereby, in pursuance and under the power of their articles of association, bind themselves, their successors, assigns, and all their estate, property, and effects, to pay to the said , or bearer, on presentation of this bond at the registered office of this company in *England*, the said principal sum of £100 on the 24th day of June, 1875, and also interest on the said principal sum of £100 until paid, at the rate £6 per cent. per annum, at the times and places mentioned in the coupons attached hereto: Provided also, and it is hereby declared, that this bond is issued subject to the condition and scale indorsed hereon.

"Given under the common seal of the company by order of the Board, the 24th day of June, 1868."

The following was the condition indorsed:—

"The company reserves the right of redeeming this and as many other obligations as the directors may think fit in each year, commencing with the year 1871; but in no case shall the amount of obligations to be redeemed in any one year be less than the amount specified in the scale hereunder written: the obligations to be redeemed in each year shall be determined by drawings at the office of the company, in the presence of two directors and a notary public, on the 1st day of May in each year; and shall become payable, with the accruing interest, on the 30th day of June following.

"The drawings on the

1st May,	1871,	will be for	£10,000
„	1872	„	15,000
„	1873	„	20,000
„	1874	„	25,000
„	1875	„	35,000
„	1876	„	40,000
„	1877	„	50,000
„	1878	„	55,000
			£250,000."

In March, 1871, the *Anglo-Italian Bank*, which had an office in *London*, entered into an agreement with the company to open a

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credit in the company's favour for £50,000, the amount, together with future advances, to be secured by a mortgage upon the property of the company in and near *Florence*. This was accordingly executed in the Italian form on the 30th of March, 1871, and registered at *Florence*, to secure £50,000, and a further sum of £5000.

Statement.

On the 14th of August, 1877, the company was served in *Florence* with a citation to appear before the Civil and Correctional Tribunal of *Florence*, at an audience to be held on the 29th of August, 1877, to hear accorded executive force in the kingdom of *Italy* to the said mortgage, and to hear authority given to the proper officer for the execution thereof. This citation was issued at the instance of the bank in order to enforce their security and judgment was obtained thereon giving validity to the deed, and enforcing payment. The bank were about to take steps for the sale of the property.

The Plaintiff, a holder of the said obligations, thereupon brought his action, "on behalf of himself and all other the holders of mortgage debentures issued by the company," against the said company and the *Anglo-Italian Bank* as Defendants, claiming a declaration that the Plaintiff and the other debenture holders were mortgagees of the company's property at *Florence* in priority to the bank, and an injunction to restrain the sale of the company's property at *Florence*.

The Plaintiff now moved that the bank might be restrained from selling the whole or any part of the estate, property, and effects of the company, at *Florence* or elsewhere, of which the bank claimed to be mortgagees.

The Plaintiff alleged that the bank had notice of the charge on the property created by the obligations. No evidence was adduced as to the rights of the parties according to the law of *Italy*.

Argument.

Chitty, Q.C., and *Cozens-Hardy*, for the Plaintiff:—

The Plaintiff, as representing the other holders of the obligations issued by the *Florence Land and Public Works Company*, is entitled to a charge upon the company's property at *Florence* in priority to the bank, who are subsequent mortgagees with notice, as we contend, of our charge. The bank is therefore

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bound by the same equity as their mortgagors, and they cannot obtain, by virtue of any foreign law, a valid security to oust ours of which they have notice: *Ex parte Pollard* (1).

It is true that this Court has no jurisdiction over the land in a foreign country which is the subject of the mortgage contract, but it can exercise jurisdiction as against the parties to the contract in this country, namely, the bank, and prevent them from dealing with property affected by our charge. If, as we contend, the bank had notice of a contract under which we are entitled to compel the mortgagor to convey to us the legal estate, they cannot go and convey away that estate to the prejudice of our rights. The fact of the property itself being subject to foreign law is for this purpose immaterial.

In *Lord Cranstown* v. *Johnston* (2) it was laid down by Lord *Alvanley* that, with regard to any contract made in equity between persons in this country respecting lands in a foreign country, the Court will hold the same jurisdiction as if the property was situated in *England*.

[JESSEL, M.R.:—That must be understood as limited to jurisdiction *in personam*.]

Penn v. *Lord Baltimore* (3) is an illustration of the same thing. The Court has in several cases appointed a receiver in respect of property abroad, and then exercised jurisdiction over it indirectly.

In *Martin* v. *Martin* (4) a mortgage of property in *Demerara* was held to be valid though the property was subject to a settlement, of which the mortgagee had notice, but which was a nullity in *Demerara*, disabling the husband and wife from dealing with it.

The question may be raised, whether the obligations—debentures, as we term them—can bind the property at all; but we contend that the words "estate, property, and effects" are quite sufficient to create a lien or charge, so as to bind all the company's land at *Florence* or elsewhere. They are redeemable instruments, and all the holders of any one issue are entitled *pari passu*.

J. D. Davenport, for the company.

(1) Mont. & Ch. 239.
(2) 3 Ves. 170.
(3) 1 Ves. Sen. 444.
(4) 2 Russ. & My. 507.

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PUBLIC
WORKS
COMPANY.
Judgment.

Davey, Q.C., and *Millar*, for the Bank, were not called on, but mentioned *Norris* v. *Chambers* (1).

JESSEL, M.R.:—

I am of opinion that the motion fails, and I think it ought to fail on every ground suggested. In the first instance, I assume that the instrument created a charge on property; it would then be a charge on all the property and effects of the company. It appears that the company had houses and land in *Florence*, which, of course, is out of my jurisdiction, and would be subject to the law of *Florence* and to Italian law. It also appears that the Defendants, the bank, advanced money to the company, and took a mortgage which was registered according to the law of *Florence*, and, as they insist, takes priority over every unregistered charge. That may or may not be so, the Italian law not being proved before me by the Plaintiff, and it is for him to shew that he has a charge according to the Italian law.

Now he has not proved it, because he has not proved the Italian law; therefore I must for the present purpose assume, as against him, that there is a want of registration, or that otherwise he has no charge. But then he says, Not having a charge according to the Italian law on the houses in *Florence*, I am still entitled to take them away from those who are entitled to them according to the Italian law, for this reason: I have a contract by the former owner of the houses to convey them to me—I am putting it as strongly as possible in his favour—and the present Defendants have obtained a conveyance of the house which was more valid according to the Italian law, with notice of my prior contract, and I am entitled to enforce that contract not only against the contracting party, but against every person who had notice of that contract.

The answer is very simple. It depends on the law of the country where the immoveable property is situated. If the contract according to the law of that country binds the immoveable property, as it does in this country, when for value, that may be so, but if it does not bind the immoveable property, then it is not so. You cannot by reason of notice to a third person of a contract which

(1) 29 Beav. 246; 3 D. F. & J. 583.

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does not bind the property thereby bind the property if the law of the country in which the immoveable property is situate does not so bind it. That would be an answer to the claim so far as regards the notion that mere notice would do.

But there is another answer to the Plaintiff's motion. It seems that these houses being in *Florence* the bank has taken proceedings in the Court of *Florence*, the proper Court having jurisdiction, to establish their title; and the litigation there to which the Plaintiffs are or may be parties being in the Court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this Court should actively interfere between the same litigants. That also appears to me to be an answer to this application.

But there is a third, and, in my opinion, a fatal answer, which is, that if the law of *England* does apply, still, as I read this document, the Plaintiff has no charge on the houses in *Florence*. That is, supposing it were property in *London* instead of in *Florence*, I should hold that the Plaintiff had no charge on it whatever. That depends on the construction of the instrument which I have before me. It seems that the *Florence Land and Works Company* are authorized to issue bonds and mortgages. The question is, whether the document which they did issue was a bond or a mortgage. In my opinion it is a bond.

First of all, and that is a very strong point as between the parties, they themselves call it a bond. Now there are two terms by which English lawyers designate bonds, both well known terms, one is bond and the other is obligation. Oddly enough, we generally use the term bond to distinguish the instrument, and the terms derived from obligation or from oblige, to distinguish the parties to it. We speak of a bond, and of the obligor and the obligee of a bond. But still the word "obligation" denotes a bond as well as the word "bond."

Now this instrument is headed by the word "obligation," in very large letters. But this is not all. "In consideration of the sum of £100 the company bind," which is a term of a bond, "themselves, their successors, assigns, and all their estate, property, and effects," to pay to *John Norton* £100, with the interest.

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M. R. 1877 NORTON v. FLORENCE LAND AND PUBLIC WORKS COMPANY. Judgment.

The words "estate, property, and effects," themselves are common words of a bond. They bind themselves to pay, and then follows the common condition on a bond, "Provided always, and it is hereby declared that this bond is issued subject to and in accordance with the conditions of a scale endorsed hereon." So that we have it called "a bond," and it is subject to a condition, and when we look at the condition we find the common condition to pay: "The company reserves the right of redeeming this, and any other obligations as they think fit," by drawings. And then they redeem them in the way they mention. The bond becomes payable with accruing interest on the 30th of June following the time when it is drawn. That is very important, because, although in the body of the bond the sum is made payable to the bearer, the condition does not make it payable to bearer on presentation, but delays the payment until the time mentioned after each drawing. That being so, there is nothing to shew that it is otherwise than a bond.

The words relied on are these: it is said they not only "bind themselves, their successors, and assigns," but "all their estate, property, and effects." Of course they do: a bond always does in a sense bind the property. In the case of a corporation it can bind nothing else; it never could bind the persons who were corporators, and now, in the case of an individual, it does not even bind him in his person, but in his property as far as it can; that is, in legal course, it binds his property generally, just as property was always bound to pay debts on judgment, and in no other way.

Any different interpretation will lead to the most wonderful results. First of all, if it is a mortgage it should take effect in order of date, and if some thousands were issued on several days, is each one to take precedence of the others according to date? It was argued, No, they take *pari passu*, because they were issued as part of the capital of half a million, and the words "capital half a million" are upon it. That will not do, that does not shew it. If there are no words in the instrument to make them pay otherwise than according to date, according to our law, they take according to date. If they take according to date, what is the meaning of tossing them into a box and drawing them so many at a time, paying those drawn and leaving the others unpaid? How could

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you pay those and leave the others unpaid if the others have a prior charge on the property, and you cannot make the property available for payment? It seems to me that the words of the thing, and the reason of the thing, all point the same way: it is a bond and nothing more, and I so hold. The motion must be refused with costs.

Solicitors for Plaintiff: *Ashurst, Morris, Crisp, & Co.*

Solicitors for Defendants: *Worthington Evans & Cook; G. M. Clements.*

HARRISON *v.* JACKSON.

[1877 H. 409.]

Will—Specific Legacy of Stock—Change of Investment—Ademption.

Bequest of "£1000 D Stock in the *London and North Western Railway Company*, now standing in the names of the trustees of my settlement, and bequeathed to me by my late wife (and which stock it is my intention to have transferred into my name), unto *A.*, *B.*, and *C.* upon trust for *A.*" The stock was never transferred into the testator's name, but was paid off by the company and reinvested, by his desire, in the purchase, in the names of the settlement trustees, of other securities:—

Held, that the legacy was adeemed, and that the residuary legatees were entitled to the securities.

Le Grice v. *Finch* (1) and *Clark* v. *Browne* (2) disapproved.

SPECIAL CASE.

Statement.

W. R. Jackson, by his will, dated the 11th of May, 1874, made the following bequest: "I give and bequeath £1000 D Stock of the *London and North Western Railway Company*, the sum of £1165 £6 per Cent. Perpetual Preference Stock of the *Furness Railway Company*, and the sum of £3000 Capital Stock of the *Lancashire and Yorkshire Railway Company*, which are now standing in the books of the several companies in the names of *G. Crosfield*, *P. Martin*, and *G. B. Ashworth*, the trustees of my marriage settlement, and which have been bequeathed to me by my late wife under a power enabling her so to do contained in the said marriage settlement (and which stock it is my intention to

(1) 3 Mer. 50. (2) 2 Sm. & Giff. 524.

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Statement.

have transferred into my name as soon as conveniently can be done) unto *G. K. Harrison*, *C. Harrison*, and *Arthur Bailey*, upon trust for the said *G. K. Harrison*, if he shall be living at the time of my death." And the testator gave the residue of his estate to the same trustees upon the trusts therein mentioned, and appointed them his executors.

At the date of the will the said sums of stock were standing in the books of the several companies, in the names of the trustees of the settlement in the will mentioned, and no part thereof was transferred into the name of the testator.

Shortly after the date of the will the £1000 D Stock of the *London and North Western Railway* was paid off by the company, and the amount was, by the request of the testator, immediately before his death, reinvested in the purchase of eighty-eight new shares in the *Lancashire and Yorkshire Railway Company* in the names of the said *G. Crosfield*, *P. Martin*, and *G. B. Ashworth*. The testator died on the 17th of July, 1875.

The question for the opinion of the Court was, whether the eighty-eight new shares in the *Lancashire and Yorkshire Railway Company* belonged to the Plaintiff as specific legatee under the will, or whether the same formed part of the testator's residuary personal estate.

Argument.

Davey, Q.C., and *Rawlins*, for the Plaintiff:—

The bequest of the £1000 D Stock of the *London and North Western Railway* was in trust for the Plaintiff, and cannot be taken to have been adeemed by its reinvestment in the purchase of the new shares.

In *Le Grice* v. *Finch* (1) a bequest of £500, described in the will as being out upon mortgage, was held not to have been adeemed, although the testatrix had called in the mortgage money.

So in *Clark* v. *Browne* (2), where a testator gave to his legatees "the amount of whatever sum or sums of money might be received" from his claim on a certain estate, and invested the greater part of the sums so received in his own name, but sold a portion, it was held that there was no ademption. On the prin-

(1) 3 Mer. 50. (2) 2 Sm. & Giff. 524.

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ciple of these cases we contend that there was no ademption here. The testator bequeathed a certain fund bequeathed to him by his wife under the power in their marriage settlement; that was the subject-matter of the bequest, and it cannot be affected by the change of investment.

Chitty, Q.C., and *Alfred Bailey*, for the residuary legatees.

JESSEL, M.R.:— Judgment.

If I were allowed to guess what was the intention of the testator in this case and in other cases where specific bequests have been held to be adeemed, I should say that the doctrine of ademption very often defeats that intention.

But the law is, that a specific legacy is adeemed when the subject-matter of it has been aliened by the testator in his lifetime. I cannot read the gift in this will as the gift of a particular fund coming from the testator's wife. All he gives is the "£1000 D Stock of the *London and North Western Railway Company*," which he describes as "standing in the names of the trustees of my marriage settlement, and which have been bequeathed to me by my late wife;" one part of the description is not more essential than another, and it is to be observed that the reference to the wife's bequest comes after the names of the trustees. There is also on the face of the will a clear intention on the part of the testator not to allow the fund to remain in their names. This sum of D Stock was paid off in the lifetime of the testator, and the money arising therefrom was re-invested in other securities, which were transferred almost immediately before the testator's death into the names of the trustees of the settlement. The testator then has, as it were, sold the D Stock, and bought something else with the money. To my mind there is no difference whether that money was applied to buy shares or horses or anything else. He has applied his own money to buy something which is not the specific article bequeathed by him.

There would, I think, be nothing to say for this point were it not for the authority of some decisions which have been cited. Those decisions being decisions on different instruments are not binding upon me, not even though they were fairly in point. The first case

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is that of *Le Grice* v. *Finch* (1), before Sir *William Grant*. I must say I cannot bring my mind to the same conclusion as that to which that learned Judge came. The case was as follows: *E. D.*, by her will, reciting that it was the wish of her mother and herself that the £500 they had then out on mortgage should be given to the Plaintiff, bequeathed the said £500 accordingly. The testatrix, after the death of her mother, called in the mortgage, and applied part of the money to her own immediate purposes, and invested the remainder in stock.

Now, the mortgage having been called in, the mortgage money belonging to the testatrix was received by her during her life, and applied by her in effect in purchasing something. That which went to purchase household necessaries and consols was completely gone. The property which she had bought remained, but it was not the money out on mortgage. Sir *W. Grant* said this (2): "The essential characteristic of the legacy is that it consists of a sum in which the testatrix admits that her mother and herself had some sort of joint interest, and which they were both desirous of giving to Mrs. *Le Grice* and her family. This characteristic was not at all dependent on the particular security on which the money might be placed. The testatrix considers the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the £500 'we have *now* out on mortgage.' That is descriptive of the present situation of the money. The next day it might not be out upon mortgage. But it would still be *the* £500 in which the mother and the daughter had a joint interest; and which, at the time of the will, they had out upon mortgage. The thing given is not the mortgage but the money. It is the *said sum* of £500 that she gives to her executors. What is this *said sum?* That sum of £500 which belonged to her and her mother, and which at a given time was out upon mortgage. Whether it remained out upon mortgage at the time of the testatrix's death appears to me to be a matter of indifference. That circumstance is no ingredient in the gift, either by way of condition, or of inherent description."

If that be so, then the Judge held that what was given was the £500 in which "my mother and myself have a joint interest," and

(1) 3 Mer. 50. (2) 3 Mer. 52.

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therefore if the testatrix had invested the money in the purchase of carriages and horses, they would have passed under that bequest. I cannot agree with the view of the learned Judge. But if I did agree, it must follow that, in whatever shape or way you may have made the disposition of the money, it would have passed, because it is a gift not only of the money out on mortgage, but of the proceeds of the fund however invested. It does not appear to me that that is the true construction to be put upon the gift in that will, for I hold these cases to be always cases of construction.

The other case was *Clark* v. *Browne* (1), in which a testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son and the other two-third parts to his wife and his son-in-law for their lives, with remainder to the son. The larger part of the amount was after the date of the will received by the testator, and invested in his name in consols, some small part of which he sold but afterwards repurchased in part. The Vice-Chancellor *Stuart* held, on the principle of civil law, that the testator having set apart a specific fund received by him in order that it might be expressly reserved for the benefit of the legatee, it was not adeemed. Now, I say nothing as to the civil law, because it was not the fact that a specified fund was set apart by the testator for the legatee, indeed he had sold out a part. The Vice-Chancellor observed (2): "If the sums received by the testator under the orders of this Court had been mixed with the general mass of his property, there would have been more room for the argument in favour of extinction and ademption. But so far from thus mixing the amount received, he invested that amount as a separate fund in £3 per cent. stock. It is a singular circumstance that he sold out small parts of this stock, and as to part of what he had sold out he repurchased stock; but it is certain that there remained at the time of his death the amount of stock originally invested, after deducting the small sums sold, but increased by the reinvestments which I have mentioned."

I must say I cannot reconcile that case with the doctrine of ademption. If a man by will gives a debt, and he is paid that debt in his lifetime, and with the money buys a horse or a per-

(1) 2 Sm. & Giff. 524. (2) 2 Sm. & Giff. 529.

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petual annuity, the horse or annuity does not pass. That one authority does not seem to me to be consistent with the ordinary rules of law on the question of ademption.

The question must be answered accordingly, that these shares form part of the residuary personal estate of the testator.

Solicitor for Plaintiff: *G. J. Brownlow*, agent for *Harwards, Shepherd, & Mills, Stourbridge; Chester & Co.*

M. R. 1877 Dec. 12.

HINE *v.* CAMPION.

[1877 H. 43.]

Evidence—Action for Misrepresentation on Sale of Goods—Scienter—Belief as to Truth of Representation.

In an action against a vendor for misrepresentation on the sale of goods, if it is shewn that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, he cannot be asked in chief whether he believed the representation to be true.

Statement.

THIS was an action to recover damages against the Defendant for alleged misrepresentation on the sale by him to the Plaintiff of certain stocking frames.

Davey, Q.C., and *Vaughan Hawkins*, for the Plaintiff.

Chitty, Q.C., and *Whitehorne*, for the Defendant.

In the course of the examination in chief of the Defendant he was asked as to the representations he had made to the Plaintiff on the sale of the machines, and the following question was put to him: "Did you believe your statement to be true?"

JESSEL, M.R., intimated that he considered that such a question could not be properly put.

The following authorities were referred to: *Taylor* v. *Ashton* (1);

(1) 11 M. & W. 401.

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Evans v. *Collins* (1); *Collins* v. *Evans* (2); *Evans* v. *Edmonds* (3); *Milne* v. *Marwood* (4); *Ormrod* v. *Huth* (5); *Benjamin* on Sales (6).

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JESSEL, M.R.:—

Where there is an action against a vendor for misrepresentation on the sale of goods, if it is shewn that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, the question cannot be asked him as to whether he did or did not entertain some other belief as to its truth, as the Court cannot enter into any question as to the state of a man's mind when the representation was made.

Solicitors for Plaintiff: *Duncan, Murton, Warren, & Gardner,* agents for *Watson & Wadsworth, Nottingham.*

Solicitors for Defendant: *Wilkins, Blyth, & Fanshawe,* agents for *G. H. Blackwell, Nottingham.*

ROGERS *v.* JONES.

M. R. 1877 Dec. 15.

[1876 R. 5.]

Costs—Higher or Lower Scale—Election—Action by disappointed Legatee for Damages or Compensation—Equitable Fraud—Common Law Action in Chancery Division—Causes and Matters assigned to Chancery Division—Additional Rules of Court, August, 1875, *Order* VI., *r.* 1—*Judicature Act,* 1873, *s.* 34.

A testator purported to devise six freehold cottages to his wife for life, with remainder to his nephew in fee, and bequeathed his personal estate—which amounted to upwards of £1000—to his wife absolutely. The cottages were not in fact the property of the testator, but of his wife. After the testator's death his widow sold the cottages to a purchaser in fee. Upon the death of the widow a purchaser of the nephew's supposed reversion under the will brought an action against her executors, claiming damages in consequence of her alleged wrongful sale, or compensation in consequence of her

(1) 5 Q. B. 804.
(2) Ibid. 820.
(3) 13 C. B. 777, 786.
(4) 15 C. B. 778.
(5) 14 M. & W. 651.
(6) Pages 359–368.

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having elected to take the cottages against her husband's will, and, if necessary, administration of the estates of herself and her husband. At the trial of the action it was declared that the Plaintiff was entitled to prove against the widow's estate (which was already being administered in another action) for the value of the cottages—subsequently assessed at £360—and for his costs in the action. In taxing the costs the Taxing Master taxed them on the lower scale under Additional Rules of Court, August, 1875, Order VI., r. 1, on the ground that the value of "the estate or fund dealt with" in the action was under £1000:—

Held, on a summons to review the taxation, that the action was nothing more than an action for damages, and not within the causes and matters assigned to the Chancery Division by the *Judicature Act*, 1873, s. 34, and that consequently the lower scale applied.

Statement.

ADJOURNED SUMMONS.

William Williams, who died on the 22nd of July, 1860, by his will, dated the 17th of July, 1860, devised all his real estates to his wife, *Jane Williams*, for life, and after her death he devised his six freehold cottages in *Rhos Street, Ruthin*, to his nephew, *Thomas Williams Rogers*, in fee; and he bequeathed his residuary personal estate to his said wife absolutely, and appointed her his executrix.

Upon the testator's death his widow, *Jane Williams*, entered into possession of the six cottages and other real estate devised by the will.

In 1864 *Thomas Williams Rogers* sold and conveyed his reversionary interest in the cottages for £210 to the Plaintiff, *John Frederick Rogers*, in fee, and notice of the sale was, it is said, given to *Jane Williams*.

Jane Williams died on the 25th of September, 1875, having by her will, dated the 22nd of January, 1873, appointed the Defendants her executors.

Shortly after her death the Plaintiff, *John Frederick Rogers*, learnt for the first time that by a settlement made in 1833 upon the marriage of *Jane Williams* with the testator, *William Williams*, the six cottages, which then belonged to the testator in fee, were settled upon certain trusts under which, in the events which happened, *Jane Williams* became, on her husband's death, absolutely entitled to the cottages; and that *Jane Williams* had in 1872, and by virtue of her title under that settlement, sold the cottages for value to a purchaser who had no notice of her husband's devise to the Plaintiff.

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Under these circumstances, the Plaintiff contended that *Jane Williams* had no right to sell the cottages, and that he was, therefore, entitled to be indemnified out of her estate in respect of the loss sustained by him in consequence of such sale; or that such sale was an election by her to take the cottages against the will of *William Williams*, and that consequently he, the Plaintiff, as the person injured by such election, was entitled to receive compensation for such injury out of the benefits derived by *Jane Williams* under that will for the loss occasioned to him by such election, and to have the amount of such benefits received by her ascertained and paid to him out of her estate by way of compensation.

John Frederick Rogers accordingly brought this action against the Defendants as the executors of *Jane Williams*, and also as the legal personal representatives of *William Williams*, claiming damages in respect of the loss sustained by him, the Plaintiff, in consequence of the alleged wrongful sale of the cottages by *Jane Williams;* or compensation in respect of the loss sustained by him in consequence of her election to take the cottages against the will of *William Williams:* assessment and payment of the amount of such damages or compensation; and, if necessary, administration of the estates of *Jane Williams* and *William Williams*.

Thomas Williams Rogers was afterwards joined as Plaintiff by amendment.

Upon the action coming on for trial on the 18th of November, 1876, it was declared that the Plaintiff, *John Frederick Rogers*, was entitled to prove against *Jane Williams'* estate for the amount of the loss sustained by him at her death by reason of her having sold the cottages, and for the amount of his costs of the action. Inquiries were also directed as to the value of the cottages at *Jane Williams'* death, and as to the amount of benefit received by her under her husband's will.

As the result of these inquiries the Chief Clerk certified that £360 was the value of the cottages at *Jane Williams'* death, and that the benefits she received under her husband's will consisted of his residuary personal estate of the value of £2331, and her life interest in the freehold estates devised by his will.

By an order made on further consideration, dated the 23rd of

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April, 1877, liberty was given to the Plaintiff, *John Frederick Rogers*, to go in under the decree made in February, 1876, in an action of *Williams* v. *Jones* [1875 W. 61a], which had already been instituted for the administration of *Jane Williams'* estate, and to prove for the £360 with interest, and also for his taxed costs of the present action. The costs of a motion to stay proceedings in the present action were also thereby ordered to be costs in the administration action. In making his taxation under that order the Taxing Master taxed the costs of this action on the lower scale, under Additional Rules of Court, August, 1875, Order VI., rule 1 (1), on the ground that the value of the cottages, as "the estate or fund dealt with" in the action, was under £1000.

The Plaintiffs in the present action objected to this taxation on the ground that as the action was instituted to establish, and did establish, an equitable fraud, the costs ought to have been taxed on the higher scale, and they, therefore, took out this summons for a reference back to the Taxing Master to review his taxation accordingly.

Argument.

Romer, for the summons:—

First, this is a case establishing equitable fraud as against *Jane Williams*, and it has been decided that the lower scale does not apply to cases of equitable fraud: *Earl of Stamford* v. *Dawson* (2), *Flockton* v. *Peake* (3).

Secondly, the substantial object of this action was to enable a specific devisee to recover the property specifically devised, or else the value of the property, and this might have involved administration of the testator's estate, which was over £1000 in value; administration is, in fact, specially claimed. This, therefore, is not a case "where the estate or fund to be dealt with is under the amount or value of £1000," so as to fall within the lower scale, under Order VI., rule 1. It is true we are now only seeking to recover £360, but the question of higher or lower scale depends, not upon the amount actually recovered, but upon the amount of the estate which is the subject of the action: *Grimes* v. *Harrison* (4).

(1) Morgan, 5th Ed. p. 628.
(2) Law Rep. 4 Eq. 352.
(3) 12 W. R. 1023.
(4) 27 Beav. 198.

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Thirdly, if your Lordship should be against me on the other two points, then I ask you, under the peculiar circumstances of this case, to exercise your discretion under rule 3 of Order VI., by allowing costs on the higher scale.

Bradford, for the Defendants, was not called upon.

JESSEL, M.R.:— Judgment.

I have no doubt at all that the Taxing Master is right.

Order VI., rule 1, refers to two sets of actions; the first set consists of actions assigned to the Common Law Divisions, and may be called common law actions, which include all actions for damages or for the recovery of land. In all common law actions, except where an injunction is sought, the lower scale is to be charged.

Then the order goes on to refer to causes and matters assigned to the Chancery Division, and among them there are certain cases specified in which the lower scale is also to apply.

Then the second rule says that in all other cases, and where an injunction is the principal relief sought, the higher scale is to apply.

Then the third rule gives special jurisdiction enabling the Judge to exercise his discretion by allowing either scale, notwithstanding the rules.

Now, in the first place, I am of opinion that this action is not an action assigned by the Judicature Acts to the Chancery Division at all. When you come to look at the 34th section of the Act of 1873, you will see that what is assigned to the Chancery Division is by no means co-extensive with the old Equity jurisdiction, but much less. The section, after assigning all causes and matters pending in the Court of Chancery at the commencement of the Act, assigns all causes and matters of which exclusive jurisdiction was given to the Court of Chancery by any Act of Parliament. Then there are other causes and matters assigned which were always the subjects of the exclusive jurisdiction of the Court of Chancery.

Now there can be no pretence for saying that the clauses of the Act assigning these particular matters to the Chancery Division

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have anything to do with any action which does not come within the description of the several matters so assigned, and it will be seen that an action for damages or compensation is not included under any of those matters.

Then what is this action? It is a curious one. It is an action virtually by a disappointed legatee seeking to make the person through whom he has been disappointed of his legacy make good to him out of her own property the amount of which he has been disappointed.

That is a well-known equity, though the action is not a common one. The facts, simply stated, are that the testator, *William Williams*, devised six cottages to his wife for life, with remainder to his nephew. The cottages did not, however, belong to the testator, but were the absolute property of his wife. When the testator died the wife took possession of the cottages and disposed of them as her own property; but as she took other benefits under the testator's will, she became liable, under the doctrine of election, to make compensation to the nephew, the disappointed legatee, for the value of the cottages. The value of the cottages was ascertained to be £360, that is, the amount to be recovered was under £1000. Therefore the object of the action was to recover £360; it was then an action really for damages, though perhaps not for damages in the ordinary sense. It is undoubtedly an action which could have been specially indorsed in any Division, though properly assignable to one of the Common Law Divisions. If it were assignable to the Chancery Division, it could only be in the shape of an administration action, under sub-sect. 1 of the first rule of Order VI.; that is, an action by the Plaintiff as a creditor claiming to have his debt paid out of the widow's estate.

But in no event could the Court or did the Court administer her estate in this action. Therefore, looking at the terms of sub-sect. 1, there was no estate to be administered in this action; nor any estate "for an account or administration of which the demand might be made." It appears to me that this is simply an action for the recovery of the value of the six cottages, or, in other words, an action for damages, and that being so, I am clearly of opinion that the costs should be upon the lower scale, and that the decision of the Taxing Master is therefore right.

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It is a hard case upon the Plaintiffs; and therefore I make no order as to costs, except that the Respondents get theirs out of the estate.

Solicitors: *C. C. Ellis, Munday, & Co.; F. W. Adams*, agent for *L. Adams, Ruthin.*

In re CIGALA'S SETTLEMENT TRUSTS.

M. R.
1878
Jan. 12.

Succession Duty—English Settlement—English Settlor—English Trustees—Foreign Funds—Foreign Beneficiaries—Foreign Domicile—"Property"—Succession Duty Act, 1853, *s.* 2.

The word "property" in sect. 2 of the *Succession Duty Act*, 1853, includes foreign moveable property—as, for instance, funds or shares of a foreign government or trading corporation—comprised in a British settlement, vested in trustees subject to British jurisdiction, and recoverable by action in a British Court.

The mere fact of a person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from payment of succession duty.

By an English settlement executed in *England* on the marriage, in 1838, of an English lady with a domiciled Italian, the lady assigned certain property belonging to her, consisting of French Rentes, shares in the *Bank of France*, and English government securities, to four trustees, of whom one was an Italian and the other three were English, upon trusts, after the death of the survivor of the husband and wife, for the children of the marriage. The settlement contained provisions usually inserted in English settlements, including a power for the trustees to reinvest in British or French securities. From the date of the marriage until their deaths the husband and wife resided in *Italy*. The Italian trustee having died, an English trustee was appointed in his place. The husband survived the wife and died in 1877, leaving two children, the only issue of the marriage, the several trust funds being then in the names of four English trustees. Both the children being domiciled Italians, the question arose whether, under the *Succession Duty Act*, 1853, duty was payable on their succession to their father in respect of the French Rentes and bank shares:—

Held, that succession duty was payable, inasmuch as the settlement was a British settlement, the trustees or persons having the legal ownership were subject to British jurisdiction, and the forum for deciding any claim by the children in respect of the trust funds was a British Court.

Statement.

BY a settlement in the English language, dated the 28th of May, 1838, and executed in *England*, prior to the marriage of *Anne Bacon*, an English lady, with the Count *de Cigala*, a domiciled Italian, certain New 3½ per Cent. Annuities, 3 per

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Cent. French Rentes, and shares in the *Bank of France*, the property of the lady, were assigned by her to four trustees, of whom one was an Italian and the other three were Englishmen, upon trust to pay the income thereof to the Count during the joint lives of himself and his wife, and to the survivor of them during his or her life; and subject thereto, upon trust, as to the capital of the trust funds, for such of the children of the marriage as the Count and Countess should by deed jointly appoint, or as the Countess, if she should survive her husband, should by deed or will appoint, and, in default of appointment, in trust for the children of the marriage equally, the shares of sons to vest at twenty-one, and of daughters at twenty-one or marriage. The settlement contained various provisions usually inserted in an English settlement, and also a power for the trustees either to retain the existing investments, or from time to time, with the consent of the Count and Countess or the survivor, or without such consent if they were not in *England*, and after their deaths at the discretion of the trustees to invest the trust funds in the same or any other stocks or funds of *Great Britain* or *France*, or upon government or real securities in *England*, *Wales*, or *France*.

The marriage took place in *England*, and immediately afterwards the Count and Countess went to *Italy*, where they resided until their deaths.

In 1862, in consequence of the death of the Italian trustee and the death and retirement of two of the English trustees, three new English trustees were appointed in their places.

The Countess died in December, 1874, and the Count in March, 1877, leaving two children, the only issue of the marriage, a son who attained twenty-one, and a daughter who married an Italian. Both of the children were born in *Italy*, were domiciled there, and were Italian subjects.

The Count and Countess had made a partial exercise of their joint power of appointment in favour of their children.

The trust funds, which at the Count's death were subject to the trusts of the settlement, consisted of 7325 francs Three per Cent. French Rentes, inscribed in the *Grand Livre* in the names of the four trustees, all of whom were English; twenty-four shares in the *Bank of France*, standing in the same names; and a sum

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of New Three per Cent. Annuities, also in the names of the trustees.

The funds so subject to the trusts of the settlement having now become the absolute property of the two children, the question arose whether, inasmuch as they were domiciled abroad, any duty was payable on their succession to their father in respect of such part of the trust funds as consisted of French Rentes and shares in the *Bank of France*, the Commissioners of Inland Revenue insisting that duty was payable on the whole of the trust funds without any distinction. The trustees thereupon paid into Court, under the *Trustee Relief Act*, the sum of £97 7*s.* 3*d.*, being the amount of duty claimed by the Commissioners in respect of the French Rentes and bank shares; and the question was raised by a petition by the two children, the daughter's husband also concurring, for payment out to them of the fund in Court in moieties. It had been conceded that duty was payable upon the New Three per Cent. Annuities.

Statement.

Chitty, Q.C., and *Sturges*, for the Petitioners:—

Argument.

We submit that succession duty is not payable in respect of the property in question, inasmuch as the fund settled is foreign, for it is really situate abroad; the persons who now claim it are foreigners, and the settlor acquired a foreign domicile.

The two most recent cases on the subject—*Attorney-General* v. *Campbell* (1) and *Lyall* v. *Lyall* (2)—were the converse of the present case, for there the settlements were by foreigners and the funds settled were English; but those cases, although they decided that succession duty was payable, are really authorities in our favour.

The *ratio decidendi* of the House of Lords in *Attorney-General* v. *Campbell* was, as appears from Lord *Hatherley's* speech (3), that the fund was locally situate here, the settlor having directed that the fund, which was originally foreign, should be brought to this country and invested here; and Lord *Westbury* says (4): "If a man dies domiciled abroad possessed of personal property, the question of whether he has died testate or intestate, and also all

(1) Law Rep. 5 H. L. 524.
(2) Ibid. 15 Eq. 1.
(3) Law Rep. 5 H. L. 528.
(4) Ibid. 529.

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questions relating to the distribution and administration of his personal estate, belong to the Judge of the domicile, and that on the principle of *mobilia sequuntur personam.* His domicile sets up the forum of administration. . . . There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality." And his Lordship further says (1): "It is quite clear that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property."

So here, we say that this fund bears the character of French property in respect of locality, and therefore cannot be controlled by an English Succession Duty Act.

In *Lyall* v. *Lyall* (2) Lord *Romilly* felt himself bound by the decision in *Attorney-General* v. *Campbell* (3), and accordingly followed it, though apparently with some reluctance.

[JESSEL, M.R.:—This is not real property, but personal property in the hands of English trustees, and you cannot get it from them except by an action in *England.* That is the true test; in order to recover the property you must come to *England.*]

We submit that under sect. 2 of the *Succession Duty Act,* 1853, for the purpose of ascertaining whether duty is payable, you must have regard, not to the trustees, but to the persons "beneficially entitled"; and so Lord *Romilly* considered in *Lyall* v. *Lyall* (4). As his Lordship there points out, it is straining the technical rule, arising out of the fiction of English law that trustees are legal owners, too far to apply it to the case of a debt due from foreigners to English trustees in trust for foreigners. Supposing all the four trustees were of different nationalities, and it became necessary to proceed against them for the recovery of the fund, it might be a matter of great difficulty to know how or where to proceed.

[JESSEL, M.R.:—Here you have a settlement made in *England,* in English, by an English lady, according to the forms of the English law: it is an English settlement.]

We submit that the mere form of the settlement is not sufficient to render what is in fact French property subject to the revenue

(1) Law Rep. 5 H. L. 530, 531.
(2) Ibid. 15 Eq. 1.
(3) Law Rep. 5 H. L. 524.
(4) Ibid. 15 Eq. 14.

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laws of this country. Moreover, the effect of your Lordship's decision in favour of the Crown would be to tax the Petitioners with double duty, for, as Italian subjects, they would have to pay duty to the Italian Government also.

[JESSEL, M.R., referred to *In re Lovelace's Settlement* (1).]

W. W. Karslake, for the Commissioners of Inland Revenue, was not called upon.

Latham, for the trustees.

Judgment.

JESSEL, M.R.:—

I think the duty is payable.

The real question is, what is the meaning of the word "property" in the 2nd section of the *Succession Duty Act*, 1853; the Legislature not having chosen to define it. In this particular case the property with which we have to deal consists of some Three per Cent. French Rentes, inscribed in the French Book, and some shares in the *Bank of France*, which is a foreign corporation, as I may call it, and the shares of which are moveable property. The property in question was the property of an English lady who was married in *England*, in the year 1838, to an Italian gentleman, and it was settled by a settlement made on the 28th of May, 1838. This settlement was to all intents and purposes an English settlement. It was executed in *England*, in contemplation of a marriage which was to take place in *England*; it was in the English language, and it was made according to the forms of the English law, forms which, I apprehend, are not applicable to the Italian law at all. It was, therefore, an English settlement, and three of the four trustees were Englishmen.

The settlement comprised, besides the property in question, some English property consisting of 3½ per Cent. Annuities, and the trusts were to pay the income arising from the property to the husband during the joint lives of himself and his wife, and to the survivor during his or her life, and then on the decease of both parents the capital was to go to the children of the marriage. I should add that the settlement contained a power for the trustees to change

(1) 4 De G. & J. 340.

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In re CIGALA'S SETTLEMENT TRUSTS.

Judgment.

the investments with the consent of the husband and wife, but without their consent if they should not be in *England*.

After the marriage the lady resided abroad with her husband, who, as I have said, was an Italian, and she had two children who were born in *Italy*, and who are now Italian subjects. Those children are the Petitioners, and being now entitled to the fund under the settlement, they claim exemption from duty. There appears to have been a change of trustees subsequently to the appointment of the original trustees, and the present trustees are, as I understand, all Englishmen.

Those are the facts. On what ground is it contended that no duty is payable? It is said that the English Government does not tax foreigners but only Englishmen. As a proposition of law I am not prepared to assent to that. There are very many cases in which the English Government does tax foreigners. We have a very familiar instance in the case of a foreigner with a British domicile dying intestate as to personal estate leaving foreign next of kin, or dying testate as to personal estate and giving the whole of it to foreigners. There the next of kin or residuary legatee pays duty out of the property, though the personal property in question may be situate abroad, the right to the property being the right of the testator or intestate; for, according to the rule of law *mobilia sequuntur personam*, the right to the property is a right governed by the domicile of the testator or intestate. In that case it is quite clear that a foreigner is taxed by the English law, though the property is actually situated abroad; and therefore it is not true as a universal rule that English legislation does not tax foreigners.

But in addition to that, there is distinct authority upon the subject. In the case of *In re Lovelace's Settlement* (1), before the Lords Justices, and in the cases of the *Attorney-General* v. *Campbell* (2) and *Lyall* v. *Lyall* (3), it was held that a foreigner might be liable to pay succession duty—that the mere circumstance of a man being a foreigner was not sufficient to exempt him.

Then upon what principle is exemption claimed here? First of all the settlor was English; the settlement was an English

(1) 4 De G. & J. 340. (2) Law Rep. 5 H. L. 524.
(3) Law Rep. 15 Eq. 1.

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settlement; originally three of the four trustees were English; and finally all of them were English. Was the property in any sense of the term "foreign"? It was in one sense foreign, that is to say, the French Government, or the collection of persons called the French nation, were the debtors or persons liable to pay, and the mode of transfer in the *Grand Livre* was regulated by the French law. Though you may turn French rentes at any moment into bonds payable to bearer and transmit them to *England*, still they are in a certain sense foreign property.

Again, the shares in the *Bank of France*, being shares in a foreign trading corporation, and being moveable property, are no doubt to some extent governed by French law, and have to a certain extent a French locality; but both kinds of property are undoubtedly moveable property, and undoubtedly subject to the general rule that the right to dispose of the property follows the person of the owner—that the disposition of the beneficial interest in the property, as distinguished from what we may call the legal right of transfer, is capable of being carried out by a contract executed according to the law of the domicile of the person to whom the property belongs.

That being so, the ownership of this property being in an English lady, it being then transferred by her to and vested in trustees, all of whom are now English, and the beneficial ownership being dealt with by this English settlement, for what reason am I to hold that this property is not liable to duty? The legal ownership is in persons subject to British jurisdiction; the forum for deciding upon the claim of the children is a British Court; for if the children wanted to obtain the trust fund they would have to bring an action in an English Court.

The settlement, then, being a British settlement, the trustees being subject to British jurisdiction, the forum for deciding upon the claim being a British Court, and the property being in fact English property, it appears to me that this is property coming within the 2nd section of the Act, and that therefore the Crown is entitled to the fund paid into Court.

Solicitors: *Wordsworth, Blake, & Co.; Solicitor of Inland Revenue.*

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M. R.

1877

March 23; *May* 4; *Dec.* 18.

PORTER *v.* LOPES.

[1877 P. 36.]

Action for Partition—Receiver—Judicature Act, 1873, *s.* 25, *sub-s.* 8—*Partition or Sale—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 4.

In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the Court has jurisdiction under the *Judicature Act*, 1873, s. 25, sub-s. 8, to appoint a receiver until the hearing.

An estate consisting of a mansion-house and 185 acres belonged to the Plaintiff and the Defendant in equal moieties. It was almost surrounded by a larger estate, of which the Plaintiff was tenant for life, and with which it was formerly united as part of the same family estate. In an action for partition or sale the Plaintiff desired a partition under which the mansion-house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate; he offering to pay what should be necessary for equality of partition. The Defendant, who was also a neighbouring landowner, desired a sale, and had offered, on the writ being issued, to submit to an immediate decree for sale:—

Held, that, under sect. 4 of the *Partition Act*, 1868, as "no good reason to the contrary" of a sale had been adduced, a sale must be directed.

Statement.

THIS was an action for partition or sale of a freehold mansion-house known as *Heywood House*, and the out-buildings, gardens, and pleasure-grounds, and a portion of the lands belonging thereto, and of certain lands forming part of *Apsley Farm*, in the parish of *Westbury*, and comprising in the whole 185 acres or thereabouts, whereof fifty-eight acres or thereabouts, part thereof, formed the site of the said mansion-house, grounds, and park, and the residue consisted of pasture and arable lands.

These hereditaments, called in the pleadings "the partition lands," devolved in 1841 upon *Henry Ludlow* for life, and, upon his death, in the events which happened, as to one moiety on the Defendant Sir *H. C. Lopes* in tail, and as to the other moiety by virtue of subsequent instruments on the Plaintiff *E. E. Porter* as tenant in fee.

Henry Ludlow was also owner in fee under another title of other lands (which, as well as the partition lands, formerly belonged to

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a maternal ancestor of the Plaintiff and Defendant), called in the pleadings "the settled estates," and consisting of about 1800 acres, and which partly surrounded and were partly intermixed with the partition lands. These estates he by his will devised to his nephew, the Plaintiff, for life, with remainder to his great-nephew *R. K. Lopes*, who was a nephew of the Defendant, in fee.

Henry Ludlow resided in the said mansion-house from 1841 till his death, in August, 1876. There was no mansion-house on the settled estates.

When the Plaintiff and Defendant became co-owners of the partition lands the Plaintiff was tenant for life of the settled estates, and the Defendant was owner of other estates in the neighbourhood.

On the 12th of February, 1877, the Plaintiff issued his writ. On the 15th of February, 1877, the Defendant's solicitors by letter offered to take an immediate decree for sale in lieu of partition without any statement of claim being delivered. The Plaintiff, who desired partition, did not accept this offer.

On the 23rd of March, 1877, a motion was made on behalf of the Defendant for the appointment of a receiver. It appeared that the Plaintiff was in occupation of that part of the property which comprised the mansion-house, but there was no exclusion by him of the Defendant, the co-owner.

Davey, Q.C., and *Ingle Joyce*, in support of the motion.

Chitty, Q.C., and *Morshead*, for the Plaintiff, referred to *Sandford* v. *Ballard* (1).

JESSEL, M.R., considered that, under the *Judicature Act*, 1873, s. 25, sub-s. 8, the Court had jurisdiction to appoint a receiver until the trial, although there was no exclusive occupation, and said he should do so in this case unless the Plaintiff elected to pay an occupation rent.

On the 4th of May, 1877, the motion was again brought on, and the Plaintiff having elected to pay an occupation rent for the mansion-house and such other parts of the property as were in his occupation, it was ordered that it be referred to Chambers to

(1) 30 Beav. 401; 33 Beav. 109.

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settle the amount so to be paid. An occupation rent at the rate of £350 a year was afterwards agreed upon.

On the 29th of May, 1877, the statement of claim was delivered.

The Plaintiff alleged that the mansion-house commanded fine and extensive views, and formed a residence suited to the property with which it had hitherto been held; that portions of the settled estates had been thrown into and formed part of the park in front of the mansion-house, and if such portions were let for building purposes, the view from the mansion-house would be seriously diminished; that the value of the mansion-house, gardens, and pleasure-grounds, if severed from the settled estates, and the value of the settled estates if severed from the mansion-house, would be seriously diminished, inasmuch as the settled estates would cease to be a residential property unless a new mansion-house were erected on a new site, and the existing mansion-house, with only a few acres of land, would not be suited for the establishment or requirements of a resident landlord, and would not command the same class of tenants as if it formed the mansion-house of and was let with a substantial estate.

The Plaintiff further alleged that the partition lands consisted of two almost isolated portions, into which they could very readily, and with advantage to each of the co-owners, be divided.

The Plaintiff further alleged that if the mansion-house were detached from the bulk of the family estates it would be prejudicial to his interests; that the mansion-house could not be sold to advantage under existing circumstances; and he submitted that such sale ought not to be ordered at the instance of the Defendant, in opposition to that of the Plaintiff, as co-owner of the partition lands.

Under the circumstances before stated, the Plaintiff was desirous that the partition lands should be partitioned between and allotted in severalty to himself and the Defendant, and that the mansion-house and a portion of the land usually held therewith should be allotted to himself, and the residue to the Defendant, the Plaintiff paying to the Defendant such sum as might be necessary for equality of partition. He submitted that there was good reason why a sale of the partition lands instead of a partition ought not to be ordered, and claimed a partition accordingly.

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The Defendant delivered a statement of defence and counter-claim on the 6th of July, 1877, and submitted that, as immediately after the service of the writ the Defendant's solicitors had offered to submit to an immediate decree or judgment for sale in lieu of partition, without any statement of claim being delivered, the costs of the action, or at all events the costs subsequent to the said 15th of February, 1877, ought to be borne by the Plaintiff.

Statement.

The Defendant claimed that the partition lands should be sold under the *Partition Act*, 1868, and he denied that this mode of dealing with it would be disadvantageous to any of the parties interested. He stated that he was himself desirous of buying the mansion-house and grounds for his own occupation, and was willing to purchase the Plaintiff's share, that it would form a desirable addition to the Defendant's own property in the neighbourhood, and that it was in itself a valuable property apart from any adjacent estates.

Dec. 18. 1877. The action now came on for trial.

Argument.

Chitty, Q.C., and *Morshead*, for the Plaintiff:—

The Plaintiff in this case desires a partition, and notwithstanding the wish of the Defendant for a sale, we contend that there are reasons in this case why the decree should be for partition rather than for sale. The Plaintiff is tenant for life of a large estate called in the pleadings "the settled estates," in the immediate neighbourhood of the property in question, consisting of about 1800 acres, on which there is no mansion-house, and which formerly formed part of the same ancestral property. It would be obviously desirable that the mansion-house and the settled estates should be in the same hands. Moreover, the saleable value of the mansion-house may be much diminished by the fact that the view from the mansion-house may at any time be obstructed by the owner of the settled estates. The settled estates are intermixed with and almost surround the land immediately adjoining the mansion-house, and a partition could very conveniently be made, giving the Plaintiff the mansion-house and pleasure-ground and the land adjoining, and the residue to the Defendant, the Plaintiff paying to the Defendant a proper sum for equality of partition.

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In *Clarendon* v. *Hornby* (1), where an estate consisted of a great house and of a farm and lands about it, and two-thirds of the estate belonged to the Plaintiff *Bligh* and his wife, and one-third to the Defendant, the Court, in making a decree for partition, recommended to the commissioners that the house and park be allowed to *Bligh* and his wife, and that a liberal allowance be made out of the rest of the estate to the Defendant in lieu of his share of the house and park.

In *Story* v. *Johnson* (2) it was held that where commissioners of partition were directed to divide lands equally between the parties entitled, it was their duty, after dividing the lands into proportions of equal value in the market, to assign them to those parties respectively to whom they would be of more value with reference to their respective situations in relation to the property before the partition took place.

Under the *Partition Act*, 1868, s. 4, the Court is undoubtedly bound in cases where a decree for partition would formerly have been made, if the owner of one moiety requests a sale, to direct a sale of the property "unless it sees good reason to the contrary." The operation of this section has been considered in the cases of *Lys* v. *Lys* (3); *Pemberton* v. *Barnes* (4); and *Rowe* v. *Gray* (5). The Legislature did not mean to lay down an absolute rule. It is discretionary with the Court, and the reason to the contrary must, no doubt, be a good judicial reason. Here we contend that the reasons against a sale are sufficient, and that a sale ought not to be directed.

[They also referred to *Roughton* v. *Gibson* (6), *Wilkinson* v. *Joberns* (7), and *Drinkwater* v. *Ratcliffe* (8).]

Davey, Q.C., and *Ingle Joyce*, for the Defendant.

Judgment.

JESSEL, M.R.:—

Mr. *Davey*, I will not trouble you, for I am in your favour. First, I will say what I think the law is, because, I am sorry to

(1) 1 P. Wms. 446.
(2) 1 Y. & C. Ex. 538.
(3) Law Rep. 7 Eq. 126.
(4) Ibid. 7 Ch. 685.
(5) 5 Ch. D. 263.
(6) 46 L. J. (Ch.) 366.
(7) Law Rep. 16 Eq. 14.
(8) Ibid. 20 Eq. 528.

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say, I have not derived that assistance from the authorites which I hoped I should have obtained. The 4th section of the *Partition Act* undoubtedly effected a change in the law as it existed before, and therefore the prior authorities are of very little use. The section is as follows: "In a suit for partition, where, if this Act had not been passed, a decree for partition would have been made, if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

Now, therefore, there is an absolute right in the owner of a moiety to require a sale subject to this; unless it sees good reason to the contrary, the Court shall direct a sale. In this case the Plaintiff has one moiety, and the principal Defendant, who has the other moiety, asks for a sale. Therefore he has an absolute right to a sale unless the Court sees good reason to the contrary. Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see some good reason why there should not be a sale. I do not say there may not be some other reason from the peculiar nature of the property, but it must be a good reason against the sale.

There are reasons which will strike one at once against a sale. Property may be of a peculiar description so as not to be actually saleable, or, at the time the sale is asked for, may be temporarily very much depreciated in value. To give an illustration: If there were two ironworks of equal value, and one party asked for a partition and the other for a sale, and at that time the furnaces were out of blast, it would be obvious that that would not be a good property to sell, and the Court would not be able to direct a sale. There are cases where the nature of the property was such that you could not well sell it. There are various properties of such a nature; thus, where the property is so attached to some other property, or such a mere dependence on another property as to be almost valueless except in connection with that property, though

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of very great value in connection with it. In that case one of the two owners would say, "Do not sell it, we can partition and divide the property; if you sell, it will fetch a song or nothing," unless some one chose to puff at the sale merely for the purpose of compelling the other owner to bid; but he would not do that at the risk of having the property left on his hands.

To shew what I mean: Suppose part of the property was a mere outhouse, or a portion of a room or a portion of a warehouse attached to some other larger property which would have actually no saleable value though of a very considerable value to the owner of the house, it seems to me it would be right to say that a sale was not the proper mode. Again, you may have very peculiar rights, which cannot be very properly divided, attached to property —manorial rights, and rights to game and things of that kind, which could not be properly severed from the land or well sold. All those are objections to the sale, and I think those are the chief objections the Court has to consider.

Then the suggestion that the Court is to be guided also by the capability, if I may say so, of the property to be partitioned, is not to be forgotten. Where there is some objection to a sale, and, in addition to that, the property can be readily partitioned, of course that does come in aid of what might otherwise be not a sufficient objection to a sale, standing alone. For instance, it might be that the property was not readily saleable, but still it could be sold, but then it could be very easily and readily partitioned. In that case I should say that that fact might be prayed in aid of the objection to a sale which might not by itself have prevented the sale, and make the Court think there was a sufficient reason shewn for there not being a sale. But in all cases the obligation of proof lies on the person who asserts there shall not be a sale, if the persons or person entitled to a moiety request a sale.

That being the position of the case, let us see what the objections are in the present instance. In the first place it is not alleged on either side that the property cannot be sold. It consists of a mansion-house, with fifty-eight acres of land lying equally round it, and a few more acres adjoining, and then a larger property lying beyond it in detached pieces of land. Nobody says it cannot be sold. In fact, the best proof that it can be sold is that

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the Defendant says he will buy it, and is very anxious to buy it. Therefore there is no doubt of the property being saleable, and saleable at a good price; and I do not see even in the allegations of the Plaintiff anything to shew it cannot be sold. What he says is, that it is worth more to the owner of a large adjoining property, nearly 1800 acres, where there is no mansion-house, than to anybody else. That may or may not be, and I am not quite so sure of that; but even if it were, that is only an additional reason for the other party to the action requiring a sale because he will make the first man give more. All that is alleged is this, that the owner of this adjoining property of which the Plaintiff happens to be tenant for life can, if he likes, damage the view from the window of the mansion-house in question.

Whenever you sell property with a sufficient surrounding, as this appears to me to have, it is no answer to say that it is more or less saleable because there may be a possibility of your neighbour cutting off some portion of the view. Wherever you buy a house with a view over a surrounding country, you must contemplate that possibility. As far as I know, it does not very much affect the selling value of the house. The probability, of course, every purchaser judges of for himself. That is one ground on which it is put.

Then it is said that these other lands surround the house in question, and are intermixed with it. In a sense that is true. They very nearly surround it with the exception of a very small portion, and in one sense that may fairly be said, and it would be very convenient to the owner of those lands, who is a member of the family to which the house once belonged, to have the house, as he has no house in the immediate neighbourhood. But is that a sufficient reason for not selling? There is no right in the owner of an estate consisting of any number of acres to have the mansion-house on adjoining land partitioned to him; for that is the question. It is not whether if a partition were directed the house should be allotted to him. I cannot say he has any such right as claimed, or that that is a good reason at all.

Then it is said it is part of an old family property, that this is the mansion-house of the estate, and there is *pretium affectionis* with which the Court ought not to interfere. But it strikes one

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at once that if that were so the owner of the estate would never have allowed the mansion-house to be severed, because, once having been the owner of the estate and the mansion-house, he would have kept them together if he had been so minded. Therefore one cannot consider that you are looking to what I may call the ancestral wishes of the family in dividing the property.

In the next place, the Plaintiff is only tenant for life of the settled estate, with remainder to a member of the Defendant's family, and the Defendant is also a landowner in the county, having lands, some very near this house, others further off, but of considerable value, and he is also anxious to reside in the house, and his lands also come from the same family as the Plaintiff's lands, with the exception of a small piece which he has purchased. It does not appear to me that one has more right to talk of *pretium affectionis* than the other. They are both landowners in the county, and as regards the Defendant, he is a fee simple owner, and if he buys this mansion-house he can certainly annex it to his estate, while the Plaintiff is only a tenant for life, with remainder, not to his own children, but to a member of the Defendant's family. I will not say he is a stranger, because he is a distant relative, but he is not in a position to annex the house and land to the estate in remainder, but only to join them together during his own life. So that really I cannot say that there is any substantial reason why my mind should incline to the one side rather than the other. I think those suggestions, if they ought to be considered at all, as to which I entertain very grave doubts, may be very fairly set off one against the other.

Then there is a last consideration, which bears very strongly against the Plaintiff. The property cannot be partitioned in the way he suggests. It can be divided in the way he suggests, but the result of dividing it will be that, inasmuch as the mansion-house and the fifty-eight acres of land are worth considerably more than the remainder of the property, a sum must be paid for equality of partition. That is stated by the Plaintiff himself in his statement of claim, so that there is no dispute about it.

Now, that is a modified sale; it is a sale of part. You have, therefore, a property which avowedly cannot be easily partitioned, because that is not partition pure and simple, but is partition *plus*

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sale. It appears to me, therefore, that you have in this case what I have always considered a substantial objection, namely, that you cannot partition the property at all as it stands, to the satisfaction of either party. It appears to me, therefore, that, looking at all the circumstances of the case, I have no good reason to the contrary; and, therefore, that I ought to direct a sale, which I do, either party being at liberty to bid.

Davey, for the Defendant, asked for the costs incurred since the 15th of February, 1877, when the Defendant offered to submit to an immediate decree for sale.

JESSEL, M.R.:—

If this had been a frivolous contest I should have made the party who had incurred the unnecessary costs pay the costs, but when there is a fair subject for discussion, and a reasonable ground for asking for the decision of the Court, then I think the proper course is to give no costs on either side up to the trial.

Solicitors for Plaintiff: *Tylee, Wickham, & Moberly.*

Solicitors for Defendant: *Gregory, Rowcliffes, & Rawle*, agents for *C. L. Radcliffe, Plymouth.*

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V.-C. M.
1878
Jan. 15.

SPILLER *v.* PARIS SKATING RINK COMPANY.

[1877 S. 119.]

Company—Contract—Promoters—Ratification.

A company can ratify a contract which was made by its promoters when the company was not in existence.

Observations on *Melhado* v. *Porto Allegre, &c., Railway Company* (1).

Statement.

THIS was a demurrer raising the question of the power of a company to ratify contracts made by its promoters.

The Plaintiff, who was a patentee of roller skates, entered into an agreement dated the 15th of October, 1875, with the Baron *de Baillot*, the main provisions of which were that the Baron should construct certain skating rinks; that the Plaintiff granted to the Baron the exclusive right of using his patent skates at a certain price; that no other skates should be used in the said skating rinks; that the Baron should not have the right of assigning the contract, but might associate himself with other persons under any form for working out the contract.

On the 16th of December, 1875, the Defendant company were incorporated under the Acts of 1862 and 1867 by the name of the *Paris Skating Rink Company, Limited.*

The statement of claim alleged that the Plaintiff, at the request of the Baron, consented to the transfer to the company of all the rights and obligations of the Baron under the said agreement, and that by virtue of certain arrangements to which the Plaintiff was a party, the company soon after their incorporation acquired all the rights of the Baron, and became subject to all the obligations of the Baron, as if the company were parties to the agreement; also that the company and their directors had, by their memorandum and articles, power to enter into and undertake such contracts, arrangements, and obligations as aforesaid. It also alleged that the company had acted upon and derived profits under the agreement.

The Plaintiff claimed a declaration that the company had

(1) Law Rep. 9 C. P. 503.

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adopted and were bound by the agreement, and an account of what was due to him under it.

The Defendant demurred.

Higgins, Q.C., and *Brice*, for the demurrer:—

Argument.

The Plaintiff might have sued for an account *quantum meruit*, but has no rights under this contract, which is not binding on the company: *Kelner* v. *Baxter* (1); *Touche* v. *Metropolitan Railway Warehousing Company* (2); *In re Hereford and South Wales Waggon, &c., Company* (3). It is not enough for a Plaintiff to plead that by virtue of certain arrangements a contract is adopted. The arrangements on which the Plaintiff relies must be set out: *Thorp* v. *Holdsworth* (4).

Glasse, Q.C., and *Grosvenor Woods*, for the Plaintiff, were not called on.

MALINS, V.C.:—

Judgment.

The case appears to me of the simplest description. The statement of claim states a contract between an Englishman and a Frenchman; and that this contract was adopted by the Defendants, a registered English company. This latter statement the Defendant says is a statement of law not supported by a statement of facts, but in my opinion it is a compound statement of law and fact, which is a sufficient pleading of the ratification of the contract.

It is argued that a contract entered into between certain individuals before a company is formed cannot be binding on the company when formed; but here the question is whether such a contract cannot be adopted by the company when formed. To deny this is to argue against a long current of authorities in this Court. In *Touche* v. *Metropolitan Railway Warehousing Company* there was a contract certainly not at first binding on the company, but it was adopted and ratified by the company, and was held by Lord *Hatherley* to be binding on them. Certain cases at law have been referred to, but *Kelner* v. *Baxter* has no application; for the only point decided in that case was that the

(1) Law Rep. 2 C. P. 174.
(2) Ibid. 6 Ch. 671.
(3) 2 Ch. D. 621.
(4) 3 Ch. D. 637.

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V.-C. M. 1878 SPILLER v. PARIS SKATING RINK COMPANY. Judgment.

persons who had made the contract were liable on it, and could not shift the burden over to the company. Great stress was laid on *Melhado* v. *Porto Allegre, &c., Railway Company* (1); but there Lord *Coleridge* himself says that the decisions at law and in equity are different, and I feel no doubt that that case would have been otherwise decided in equity. Lord *Coleridge* says that the case of *Touche* v. *Metropolitan Railway Warehousing Company* (2) rested upon the principle of trustee and *cestui que trust*, but in my opinion it rested on no such principle, but on the power of a company to adopt contracts made by its promoters after its formation. In this case the Defendants are alleged by the statement of claim to have ratified and acted upon the contract. The demurrer must be overruled.

Solicitors: *G. S. & H. Brandon; Combe & Wainwright.*

(1) Law Rep. 9 C. P. 503. (2) Law Rep. 6 Ch. 671.

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In re PERKINS BEACH LEAD MINING COMPANY.

V.-C. B.
1877
Dec. 6.

Company—Execution Creditor—Levy by Sheriff before Presentation of Winding-up Petition—Injunction—Companies Act, 1862, *ss.* 87, 163.

Proceeding to a sale under an execution perfected by seizure before the commencement of a winding-up is a "proceeding" within the 87th section of the *Companies Act*, 1862, and will be restrained if the Court has reason to doubt the *bona fides* of the transaction.

Statement.

MOTION.

On the 29th of September, 1877, the sheriff of *Shropshire* seized the property of the *Perkins Beach Lead Mining Company, Limited*, under a writ of *fi. fa.* issued by one *William Preston*, who had obtained judgment against the company for a sum of £262 8*s.* 5*d.*

On the 2nd of October the company presented a winding-up petition, and on the 3rd of November a compulsory order was made.

The sheriff had remained in possession, and now advertised a sale.

The company thereupon moved, under sect. 87 of the *Companies Act*, 1862, for an injunction to restrain the sheriff from proceeding to a sale, and the execution creditor from proceeding further with his judgment.

In an affidavit filed in support of the motion it was stated that the writ was served on the secretary of the company, who was also the clerk of the execution creditor, and was not brought to the notice of the directors.

Argument.

Bradford (Sir *H. Jackson*, Q.C., with him), for the motion.

Russell Roberts, for the sheriff:—

This being an execution perfected by seizure before the commencement of the winding-up, the sale by the sheriff is not a "putting in force" of the execution within the 163rd section of the Act: *Re Great Ship Company* (1). The question, therefore, is whether such a sale is "a proceeding" within the 87th section, and whether the Court, in the exercise of its discretion, will

(1) 4 D. J. & S. 63.

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In re PERKINS BEACH LEAD MINING COMPANY.

restrain it. It would seem that the Court will not interfere in such a case: *Ex parte Millwood Colliery Company* (1).

The execution creditor did not appear.

Argument.

Bradford, in reply:—

The 87th section is a statutory stay of all proceedings against the company, and gives the Court seisin of all the property of the company which cannot be touched without its leave: *In re Universal Disinfector Company* (2); *In re Dimson's Estate Fire-Clay Company* (3). The Court, therefore, having a discretion, will not, under the suspicious circumstances of this case, allow this execution creditor to proceed.

Judgment.

BACON, V.C.:—

It is said that selling under an execution levied before the commencement of a winding-up is not "a proceeding" under the 87th section of the *Companies Act*, 1862, but I think that it is essentially a proceeding. This is an application under that section to restrain a judgment creditor from proceeding with his execution, which, being a proceeding, cannot go one step further without the leave of this Court. The question does not affect the sheriff, who is protected, and is entitled to have his costs and fees against the company, but I cannot allow him to be made a stalking-horse for the execution-creditor, who does not think fit to appear. The affidavit filed in support of the motion alleges circumstances which, if true, and they are unanswered, shew that this execution was obtained fraudulently. *Re Great Ship Company* (4) was the case of a *bonâ fide* creditor. The distinction, therefore, between the two cases is obvious. In my opinion, therefore, it is competent for the Court to restrain, and, upon the facts stated, it is its duty to restrain, this creditor from proceeding further with the judgment he has obtained, and that is the order I now make.

Solicitor for Company: *W. Webb.*

Solicitors for Sheriff: *Chester & Co.*, agents for *Peele & Peele, Shrewsbury.*

(1) 24 W. R. 898.
(2) Law Rep. 20 Eq. 162.
(3) Law Rep. 19 Eq. 202.
(4) 4 D. J. & S. 63.

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CHAMPION *v.* FORMBY.

V.-C. B.
1878
Jan. 11.

[1877 C. 30.]

Practice—Rules of Court, 1875, *Order* xx., *r.* 3—*Confession—Signing Judgment for Costs.*

Where a Defendant is adjudicated bankrupt after action brought, upon an act of bankruptcy which occurred before action brought, the Plaintiff may confess that the property claimed was in the order and disposition of the Defendant at the date of the act of bankruptcy, and sign judgment under Rules of Court, 1875, Order xx., r. 3, for his costs.

Statement.

THIS was an action as of trover for a horse.

On the 10th of November, 1876, the Defendant *Earle* sold a horse to the Plaintiff for £44. The Plaintiff allowed the horse to remain in possession of the Defendant *Earle* on hire at 25*s.* per week. On the 11th of November, 1876, the Defendant *Earle* presented a petition for liquidation or composition. On the 19th of December, 1876, resolutions for composition, and not liquidation, were registered, and the Defendant *Formby* was appointed trustee to carry out the resolution. On the 25th of January, 1877, the Defendant *Formby* took possession of *Earle's* property, and also of the horse in question. On the 1st of February, 1877, the Plaintiff commenced his action and delivered his statement of claim. The horse was sold by *Formby*, and the proceeds subsequently ordered to be paid into Court.

On the 2nd of July, 1877, the defence was delivered, stating that on the 1st of June, 1877, *Earle* was adjudicated bankrupt on the act of bankruptcy constituted by filing the said petition of the 11th of November, 1876, and that the horse was then in the order and disposition of the Defendant *Earle* with the consent of the Plaintiff.

The Plaintiff delivered a confession of this defence, and signed judgment for his costs under Order xx., rule 3.

The Defendant *Formby* took out a summons to set aside the judgment and to have the action dismissed with costs.

Argument.

De Gex, Q.C., and *Doria*, for the summons, contended, 1, that,

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as the adjudication related back to the act of bankruptcy, this was not a ground of defence which had arisen after action brought, as the act of bankruptcy was before action brought; 2, that in this case the Judge should "otherwise order," as the Plaintiff, by allowing the horse to remain in possession of the Defendant *Earle*, had misled the Defendant *Formby*: *Ex parte Charlton* (1).

Kay, Q.C., and *Mulligan*, for the Plaintiff, were not heard.

Judgment.

BACON, V.C.:—

No evidence has been adduced by the Defendant to shew any kind of negligence on the part of the Plaintiff, so that the only question I have to decide is upon Order XX., rule 3, whether the plea of an adjudication in bankruptcy four months after the date of the service of the writ is "a ground of defence which has arisen after the commencement of the action." In my opinion it is. Till the month of June, 1877, there was no fact which could have been pleaded by way of defence; till then no ground of defence had arisen. As to the doctrine of relation, it is not necessary to say anything. I am of opinion the Plaintiff was entitled to sign judgment for his costs. The summons will be dismissed with costs. The Plaintiff's costs of action and this application will be paid out the fund in Court, and the residue of the fund will be paid to the Defendant.

Solicitors: *Duignan & Smiles; Richard Jones & Co.*

(1) 6 Ch. D. 45.

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WHIDBORNE *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND.

V.-C. H. 1877 Nov. 6, 10.

[1875 W. 30a.]

Land Tax—Sale of Lands for Redemption of—Ecclesiastical Corporation—Reservation of Minerals—39 *Geo.* 3, *c.* 21, *s.* 12—57 *Geo.* 3, *c.* 100, *s.* 25.

The Act 39 Geo. 3, c. 21, which enabled ecclesiastical corporations to sell lands for the redemption of the land tax, provided in sect. 12 that no minerals belonging to any lands sold by such corporation should pass in any conveyance of such lands either by express or general words, but should be always absolutely excepted and reserved as fully as if expressly excepted in the conveyance. The Act 57 Geo. 3, c. 100, contained enactments confirming invalid sales under the first Act.

In the interval between the two Acts a prebendary sold lands, reserving in the conveyance the pipe and potter's clay thereunder to the prebendary for the time being, except within twenty perches from the houses and inclosures forming part of the lands sold:—

Held, that the subsequent confirming enactments of 57 Geo. 3, c. 100, s. 25, did not so ratify the conveyance as to give validity to the exception from the reservations, but that all the clay under the lands conveyed was reserved to the prebendary and his successors in title, and that they had the powers of working the same incident to the reservation thereof under the first mentioned Act.

Statement.

THE Act 39 Geo. 3, c. 21, for enabling bodies corporate and companies to sell a competent part of their hereditaments for the redemption and purchase of the land tax, enacts in sect. 12 as follows:—"Provided always that no mines or minerals . . . belonging to any . . . hereditaments which shall be sold by any bishop or other ecclesiastical corporation for the purpose of redeeming any land tax, whether the same shall be opened or unopened, nor any right, title, or claim to open or work the same, nor any advowson or right of patronage or presentation to any living or ecclesiastical benefit, or right of nomination to any perpetual curacy, shall pass by any conveyance of such . . . hereditaments either by express or general words in such conveyance, although such advowson, right of patronage, or presentation or nomination may be appendant or appurtenant to such . . . hereditaments, and such mines or minerals . . . and such advowson, rights of patronage or presentation or nomination shall be always absolutely excepted and

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Statement.

reserved to such bishops or other ecclesiastical corporations aforesaid as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved."

In the year 1799 the Rev. *B. Spry*, Prebendary of *Salisbury*, for the purpose of redeeming the land tax on part of the estate of his prebend, sold, under the powers of the above-mentioned Act, to a Mr. *Nicholas Watts* certain lands forming part of the prebendal estate; and by indenture dated the 10th of December, 1799, conveyed the same subject to the following reservation:—"Except nevertheless all merchantable clay for pipes and for the use of potters only hereafter to be or arise in or from the said lands and premises hereby conveyed, or any part thereof, except as hereafter mentioned, with liberty and power of ingress, egress, and regress, after the determination of the several leases by which the said *Nicholas Watts* now holds the said premises for ninety-nine years determinable as therein mentioned, to and for the prebendary of the said prebend for the time being and his assigns and his and their agents and workmen into, upon, over, and from the said premises, to search for, dig, land, and work on any part thereof (except in or upon or within the distance of twenty perches from the houses, buildings, outhouses, courtlages, gardens or orchards, or enclosed meadows of the said premises), such pipe and potter's clay as aforesaid. And to carry away the same with all manner of carriages and horses at all times, doing no wilful waste or damage thereby to or upon the said premises or any part thereof."

The Act 57 Geo. 3, c. 100, for making further provision for the redemption of the land tax, enacts in sect. 25 as follows:—"And whereas for the purpose of redeeming or purchasing land tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land tax, or for purchasing assignments of land tax, or for some other purposes for which lands and hereditaments were authorized to be sold under the powers and provisions of the Acts heretofore passed relating to the redemption and sale of the land tax, or some of them, some sales of lands and other hereditaments have been made the titles to which as derived under such sales may be considered void or voidable, or liable to be impeached at law or

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in equity, or be liable to objections calculated to impede the free alienation thereof, Now be it further enacted that all sales made, and all conveyances executed of lands or other hereditaments sold for the purpose of redeeming or purchasing land tax, or for raising money as hereinbefore is mentioned, provided such conveyances shall appear to have been executed under the authority and with the consent and approbation of the respective Commissioners for the time being authorized to consent to sales made under the powers of the said Acts respectively, or any of them, shall be and the same are hereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and the same shall be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under, or in trust for them respectively, a good and valid title both at law and in equity to such lands or hereditaments to all intents and purposes whatsoever, anything in the said Acts or any law or custom to the contrary notwithstanding."

The Plaintiffs in this action were persons claiming, through Mr. *Nicholas Watts*, interests in the lands so purchased by him from Mr. *Spry*, and they contended that under the indenture of the 10th of December, 1799, and the provisions of the Act 57 Geo. 3, c. 100, all the clay under the lands comprised in the exception was effectually conveyed and did pass to and was now vested in the persons claiming under *Nicholas Watts;* and their case was that the Defendants, the Ecclesiastical Commissioners (in whom were now vested the estates of the prebend, Mr. *Spry*, as his successors in title), and their lessees were working the pipe and potter's clay upon the lands conveyed by Mr. *Spry* and not comprised in the exception in such a manner as to injure and partially destroy the surface, and thus injure the Plaintiffs' property; and that they also claimed to be the owners of and intended to work in the same manner the clay under the lands within the twenty perches excepted in the conveyance of 1799.

By their action the Plaintiffs claimed that the estates and interests of the Defendants the Commissioners and their lessees on the one hand, and the Plaintiffs and other persons claiming under

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Nicholas Watts on the other, with respect to the clay under the lands comprised in the indenture of the 10th of December, 1799, might be declared; that it might be declared that the clay under the lands comprised in the exception was effectually conveyed by the said indenture, and was now vested in the persons claiming under *Nicholas Watts;* and that it might be declared that the Commissioners and their lessees were not entitled to work the clay under the lands comprised in the said indenture, whether comprised in the exception or not, so as to let down or injure the surface; and they also claimed an injunction and damages.

Argument.

Joshua Williams, Q.C., *Dickinson*, Q.C., *C. T. Simpson*, and *Phillpotts*, for the Plaintiffs:—

Although under the Act of 39 Geo. 3, c. 21, all the minerals ought to have been reserved by the prebendary, and the conveyance of 1799 ought not to have excepted from the reservation those under the twenty perches, this breach of that Act was cured by the 25th section of the subsequent Act of 57 Geo. 3, c. 100, which had the effect of ratifying and confirming the sale and the conveyance, and of making the exception from the reservation effectual: *Doe* v. *Philips* (1); *Beaden* v. *King* (2). The language of the 25th section of the Act 57 Geo. 3, c. 100, is express, that where sales and conveyances for the redemption of the land tax have been made with the consent and approbation of the Commissioners (as this was), such sales and conveyances are to be ratified and confirmed, and to be valid and effectual, notwithstanding anything to the contrary contained in the previous Land Tax Redemption Acts. The minerals and clay under the lands excepted from the reservation are therefore vested in the persons claiming through *Nicholas Watts*, and the Defendants have no interest in nor any right to work the same.

They further contended that even if the exception from the reservation was invalid, the Defendants were so working as to injure and let down the surface in violation of the maxim, *Sic utere tuo ut alienum non lædas.*

Warmington, for Defendants in the same interest as the Plaintiffs.

(1) 1 Q. B. 84. (2) 9 Hare, 499.

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Bristowe, Q.C., and *Swan*, for the Defendants the Ecclesiastical Commissioners, and their lessees:—

Argument.

In *Doe* v. *Philips* (1) and *Beaden* v. *King* (2) the defects in the sale held to have been remedied by the confirming statute were of a totally different character. This is the case of a sale of that which the statute under which the sale was effected had enacted never should be sold, and the confirming statute cannot be held to ratify such a sale as that. Suppose an ecclesiastical corporation had purported to sell an advowson under the Act of 39 Geo. 3, could it be held that the confirming statute had the effect of rendering that valid?

They also contended that the pipe and potter's clay which they were entitled to work, could only be got by open workings, and that it was impossible to work in any other manner than they were doing.

Judgment.

HALL, V.C., after saying that it was not proved in evidence that pipe and potter's clay could not be worked otherwise than by an open working, and accordingly that the question what would be the case if the impossibility of otherwise working the clay had been proved did not arise, and that the principle involved was the ordinary one, that the reservation of minerals does not enable the person in whose favour it is made so to work them as to let down the surface, continued:—

Upon the question whether the 25th section of the Act 57 Geo. 3, c. 100, has had the effect of varying what would otherwise be the operation of the deed of the 10th of December, 1799, the matter stands thus: The Act 39 Geo. 3, c. 21, was passed very shortly before the date of that deed, and it cannot be reasonably questioned that the effect of that statute, at all events at the time when the deed was executed, and thenceforth until the time when the Act 57 Geo. 3, c. 100, was passed, was to strike out of the deed the exception out of the exception, and to make it necessary to read the deed as if the exception of the mines was without an exception out of it. Then comes the question whether the effect of the Act 57 Geo. 3, c. 100, was not so to ratify the deed which had

(1) 1 Q. B. 84. (2) 9 Hare, 499.

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Judgment.

been executed some years previously as to make valid and effectual the exception out of the exception. It appears to me that although the letter of that statute gives some colour to the contention of the Plaintiffs, still it is not within the fair and reasonable spirit and meaning of the enactment. The cases which have been referred to do not go far enough to enable me to put such a construction on the statute. *Doe* v. *Phillips* (1) was a case in which, by mistake or misapprehension of the rights of the particular person whose property was being sold, he was treated as being entitled to a part of the purchase-money representing timber, whereas, according to the true construction of the Act, the whole of the purchase-money ought to have been paid into Court. There was no question in that case whether property had been sold which an Act of Parliament had said should not be sold, but a question of a totally different character, to which it was considered the Act was intended to apply, and it was held that the defect was cured. The only other case is *Beaden* v. *King* (2), in which a variety of objections were taken to the sale, the most important of which was that the same person was both vendor and purchaser, for the property sold was prebendal, and the prebendary was buying it himself. That was an objection which was considered by the Vice-Chancellor *Turner* to be cured by the confirming statute. There were other objections made which the Vice-Chancellor did not consider were objections to the sale, but held that if they were they were cured. These are stated at p. 510 of the report, and, as I understand them, they were that the Act did not authorize a sale for the redemption of part only of the entire sum charged upon the premises; that part of the premises were of the nature of copyholds for lives, and that the sale thereof in the manner in which it was made was not authorized by the statutes: those objections were as to the mode of sale, and did not embrace the case of a sale of that which there was no title to sell at all, as, for instance, an advowson. Then followed another objection of a general character, the meaning of which I do not exactly know, that from the nature of the premises sold, and of the other premises constituting the estate of the prebendary, the sale was not authorized by the statutes.

(1) 1 Q. B. 84. (2) 9 Hare, 499.

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This, therefore, was a totally different case from the present, and it appears to me that to give to the Act of 57 Geo. 3, c. 100, an operation which would have the effect of excluding from or including in a conveyance executed many years before, property which the Act of Parliament under which the conveyance was made said should never be sold or should be reserved, would be to put a most violent construction upon it. I cannot apply the Act in that way, and I hold that the exception out of the exception must be considered as not inserted in the deed. There will accordingly be a declaration that the clay under the lands comprised in the exception out of the exception was not effectually conveyed by the indenture of the 10th of December, 1799; and there will also be a declaration that the Defendants are not entitled to work or get the clay so as to destroy, injure, or let down the surface of the lands comprised in that indenture, and this will give the Plaintiffs all they are entitled to. As a consequence of this the Commissioners will have the ordinary right of getting the clay under the portion excepted out of the exception, but not the power of getting it under any of the powers of getting which are contained in the instrument, that is to say, the Commissioners and their lessees will not be entitled to make use of the express powers to get this clay, but only such powers of working and getting it as are by reason of the reservation thereof by the Act 39 Geo. 3, c. 21, s. 12, incident to their ownership. That disposes of the whole case, and as the Plaintiffs have failed in a material part of their case, there will be no costs given.

Solicitors: *Yarde & Loader*; *F. Watts*; *Jennings, White, & Buckston.*

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V.-C. H.
1877
Nov. 20.

BLANN *v.* BELL.

Administration Suit—Residue of Real and Personal Estate given to Charities—Marshalling—Payment of Legacies and Costs.

A gift of a share of real and personal residue to a charity having failed except as to pure personalty:—

Held, that the costs of an administration suit ought nevertheless to be borne by the general estate.

The rule laid down in *Gowan* v. *Broughton* (1) dissented from.

Statement.

THOMAS BLANN, who died in 1846, by his will, dated in 1842, after desiring that all his debts, funeral and testamentary expenses, should be paid; appointing four trustees; and bequeathing certain pecuniary and specific legacies; gave all the residue of his estate and effects, whether real or personal, to the trustees upon trust to pay the dividends accruing upon the funds specified to certain persons for life, and then gave all the residue of his estate upon trust to pay the annual produce to his wife for life for her separate use, and after her decease gave £10,000 to such persons as his wife should appoint, and, subject to such life estate and power of appointment, gave all the annual produce to his niece, *F. Raynor*, for life for her separate use, and after the death of his wife and niece, upon trust to divide such residue between the children of the niece, and in case the niece should die without issue who should live to attain the age of twenty-one years, then upon trust to divide among any children of his wife by any future husband the sum of £4000 when they should attain the age of twenty-one years. In the event of his niece dying without issue, the testator gave other pecuniary legacies, and directed his trustees to divide the residue into two equal moieties, and to hold the same in trust for the *Hertford* and *Bath Infirmaries*: *Blann* v. *Bell* (2).

The testator left both real and personal estate.

The tenants for life had died without issue, and the cause now came on to be heard upon further consideration.

A Master in Chancery in his report, made many years ago, stated who were the heir-at-law and next of kin of the testator.

(1) Law Rep. 19 Eq. 77. (2) 2 D. M. & G. 775.

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Statement.

The *Hertford Infirmary* could not take a devise of real estate, or a bequest of personal estate savouring of realty; but by an Act of Parliament, passed in the nineteenth year of Geo. 3, the *Bath Infirmary* or *Hospital* was empowered to take by will and hold lands in mortmain to the extent in value of £1000 per annum; and by the report of the same Master it appeared that the income of the infirmary was at that time less than £500 a year, and it further appeared that the rent and the income from impure personalty to be received from this moiety would be less than £500 a year.

Argument.

W. Pearson, Q.C., and *Quin*, for the Plaintiffs, the appointees of the widow of the £10,000.

Dickinson, Q.C., and *Rigby*, for the *Hertford Infirmary*, referred to *Gainsford* v. *Dunn* (1), and to the cases there cited; where it was stated (2) that the result of the cases was that, where you find a legacy followed by a gift of the residue of real and personal estate, the word residue was considered to mean that out of which something given before had been taken, and that was to make the residue a mixed fund, and to charge the legacies proportionally and rateably upon the mixed fund; and they submitted that that course ought to be followed in this case for the benefit of this charity.

Hastings, Q.C., and *Woodroffe*, for the *Bath Infirmary*, contended that the question as to the annual value of the real estate held by this charity was concluded by the decree in this case in 1852.

Macnaghten, *Crossley*, and *Medd*, for the heir-at-law, next of kin and trustees.

Judgment.

HALL, V.C.:—

I think that the case of *Gainsford* v. *Dunn* does not govern this case. The property here has been made one aggregate fund, and I cannot hold that the payment of the debts and legacies ought to be marshalled in favour of the *Hertford* Charity. As to the annual value of the moiety given to the *Bath Infirmary*, there

(1) Law Rep. 17 Eq. 405. (2) Law Rep. 17 Eq. 408.

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V.-C. H. 1877 BLANN v. BELL.

having been no suggestion that the annual value has increased, I shall not direct any further inquiry, but act upon the Master's report, and hold that that Charity is entitled to a moiety of the real and personal estate.

On the question of costs,

Dickinson, Q.C., referred to the case of *Scott* v. *Cumberland* (1), and stated that Vice-Chancellor *Malins* had held that the rule that, in providing for the costs of an administration suit, real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of, applied equally to real estate which descended by reason of lapse and to that as to which no disposition had been attempted; and also to the case of *Gowan* v. *Broughton* (2) (a suit for the administration of personal estate), where Vice-Chancellor *Malins* said that the only residue was that given by the testatrix to her niece, which lapsed and was liable to all the expenses and debts; and stated that the Vice-Chancellor said that he decided the same question as to real estate in *Scott* v. *Cumberland*, and that it would be very inconvenient if there should be one rule as to real and another as to personal estate.

Macnaghten referred to the case of *Trethewy* v. *Helyar* (3), where the Master of the Rolls held that the costs of a suit for the administration of an estate were payable out of the residue generally, and not primarily out of the lapsed share, and dissented from the *dictum* of Vice-Chancellor *Malins* in *Gowan* v. *Broughton*; and guarded himself against being supposed to assent to or dissent from *Scott* v. *Cumberland*, which had reference to real estate. He also referred to *Williams* v. *Kershaw* (4) and *Seton* on Decrees (5).

Byrne (as *amicus curiæ*) mentioned that Vice-Chancellor *Bacon* had, in a recent case of *Fenton* v. *Wills* (6), followed the decision of the Master of the Rolls in *Trethewy* v. *Helyar*.

(1) Law Rep. 18 Eq. 578.
(2) Ibid. 19 Eq. 77.
(3) 4 Ch. D. 53.
(4) 1 Keen, 274, n.
(5) 3rd Ed. vol. i. p. 334.
(6) *Ante*, p. 33.

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HALL, V.C.:— V.-C. H.

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BLANN v. BELL.

I am of opinion that the rule of the Court is not that stated in the case of *Gowan* v. *Broughton* (1), and therefore I hold that the costs must be paid out of the general estate not specifically bequeathed.

Solicitors: *Senior, Attree, & Johnson*, agents for *Brydone, Petworth; J. N. Mason; Lambert, Petch, & Shakespear; Webb, Stock, & Burt; Maples, Teesdale, & Co.*

OWEN *v.* HENSHAW.

V.-C. H.

1877

Nov. 30.

[1876 O. 294.]

Action in the Chancery Division and District Registry—Trial at Liverpool—Petition for Charging Order—Solicitors Act (23 & 24 *Vict. c.* 127), *s.* 28—*Practice—Jurisdiction.*

In an action intituled in the Chancery Division, *Liverpool* District Registry, and tried before a Judge and jury at *Liverpool*, a petition under the statute 23 & 24 Vict. c. 127, s. 28, by a solicitor for an order to charge the property recovered or preserved must be presented to the Judge who tried the action, the Judge of the Chancery Division, to whose Court the action was attached, having no jurisdiction to hear the petition.

Statement.

THE action of *Owen* v. *Henshaw* [1876 O. 294] was intituled "In the High Court of Justice, Chancery Division, *Liverpool* District Registry—Vice-Chancellor *Hall*." The writ was issued on the 4th of December, and the statement of claim delivered on the 23rd of December, 1876.

The Plaintiff, *Frederick Owen*, had entered into a partnership with the Defendant, *H. Henshaw*, to work some gravel and stone quarries near *Conway*, and he prayed for declarations that a certain document which he had signed was void; that he was still a partner; for an injunction and for accounts; and that he had a lien upon the share of the said Defendant in the partnership, and for the amount due to him in respect of a certain judgment which he had obtained in a former action; and for costs. The action was tried before Baron *Huddleston* and a jury at *Liverpool*. The jury

(1) Law Rep. 19 Eq. 77.

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found that the Plaintiff had not proved the charge of fraud which he had alleged in his statement of claim, and all other questions as between him and the Defendants were reserved for the Court at *Westminster*.

On the 30th of May the Court at *Westminster* gave judgment, ordering that judgment should be entered for the Defendants, and adjudging that the Plaintiff do recover nothing against the Defendants, and that the Defendants do recover against the Plaintiff their costs of the defence.

The judgment in the action was recorded in the Chancery Division, and was as follows:—

"*Leach*, Registrar. This case having, on the 27th day of March, 1877, been tried before the Hon. Mr. Baron *Huddleston* and a common jury of the county of *Lancaster*, *West Derby Division*, and the jury having found a verdict for the Defendants, and the said Mr. Baron *Huddleston* having ordered that judgment be entered for all the Defendants with costs, as by the associate's certificate appears: Therefore it is adjudged that the Plaintiff recover nothing against the Defendants, and that the Defendants recover against the Plaintiff their costs of defence, to be taxed by the Taxing Master."

This was a petition presented by the solicitors for the Plaintiff *Owen*, to obtain a charging order upon the property preserved or recovered in the former action, and asking that the charge might be declared to be paramount to a judgment which had been obtained subsequently by an execution creditor, and against whom the writ in the action of *Jameson* v. *Henshaw* was issued merely for the purpose of bringing him before the Court. The petition was intituled originally in the action of *Owen* v. *Henshaw* (but on the 13th of November, 1877, an amendment was, by order, made by its being intituled, in addition, "*Jameson* v. *Henshaw*" [1877 J. 162]), and in the matter of the 23 & 24 Vict. c. 127 (*The Solicitors Act*).

Argument.

Russell Roberts, for the Petitioner.

Owen, for the Defendant *Fisher*, objected to the jurisdiction on the ground that a charging order under the 28th section of the statute 23 & 24 Vict. c. 127, must be made by the Judge who

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V.-C. H. 1877 OWEN v. HENSHAW. Argument.

tried the action, and that, therefore, Baron *Huddleston* was the Judge to whom this application ought to be made, as no order could be made by the Vice-Chancellor, who had never exercised any judicial action in the matter. *In re Fiddey* (1). The petition had been wrongly presented, and ought to be dismissed with costs.

Phear, for the execution creditor, relied upon the same objection.

Freeling, for the Sheriff of *Carnarvon*.

Bardswell, for other parties.

R. Roberts, in reply, contended that the case of *In re Fiddey* was no authority, as the decision was before the *Judicature Act*, which created one High Court of Justice. Though the action was tried before a Judge and jury at *Liverpool*, yet it was intituled in the Chancery Division; and in this Division all the pleading and the judgment had been recorded. Behind the judgment the Court ought not to go. The objection was a technical one, and ought to be overruled.

Judgment.

HALL, V.C.:—

The question is one of practice and substance, and not of technicality. The substantial question in the action was tried before Baron *Huddleston*, and I am of opinion that Baron *Huddleston* is the proper Judge to hear this application, as the statute 23 & 24 Vict. c. 127, which is a special one, requires all applications under it to be disposed of by the Judge who tried the case. I hold, therefore, that I have no jurisdiction to hear the petition; and all I can do is to give the Petitioner leave to apply to the Court for a transfer of his petition to Baron *Huddleston*, or to that Division of the Court of which that learned Judge is a member.

Solicitors: *Kennedy, Hughes, & Kennedy*, agents for *Parry, Jones, & Jameson, Conway; H. C. Coote; Burton, Yeates, & Hart; Simpson, Hammond, & Co; Prior, Bigg, Church, & Adams*, agents for *T. Dalton, Leeds.*

(1) Law Rep. 6 Ch. 865.

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FRY, J.
1877
Dec. 1.

ATTORNEY-GENERAL *v.* TOMLINE.

[1874 A. 124.]

Practice—Consent Judgment—Mistake—Time.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement.

Statement.

ON the trial of this action judgment was given for the Crown, which was declared entitled to an injunction and to damages for taking coprolites; as reported (1). Mr. Justice *Fry* then suggested that the amount of damages might be ascertained by one of the referees, or that he himself might fix the amount. The counsel for the Defendant offered to pay half the gross value of the coprolites taken, and this offer was accepted by the Crown. The judgment was not drawn up, passed, and entered until more than a fortnight after it was given, and was as follows, so far as relates to this part of the case:—

"And the Defendant, by his counsel, undertaking to pay to the Secretary of State for War half the gross amount realized by the sale of the coprolites got from the said *Q Tower* land (the amount to be verified by affidavit), this Court doth dispense with any account as to damages sustained by reason of the Defendant's trespass thereon."

The Defendant now moved to set aside this part of the judgment as having been consented to under a mistake. It was now stated that the coprolites had not been taken by Colonel *Tomline*, but had been taken by his licensees under a previous deed, under which he had only received a royalty on them of 12*s.* per ton, the gross market value being about £2 5*s.*

Argument.

Cookson, Q.C., and *Phear*, in support of the motion:—

The Defendant and his solicitors had forgotten the actual state of things, and did not discover what it was until lately. It is obvious that he would not have consented to pay such a sum unless

(1) 5 Ch. D. 750.

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he had received the money. No doubt it is not easy to set aside a consent order, but it has been done: *Cooper* v. *Phibbs* (1). Even if money had been actually paid and a mistake was proved, the Court could order it to be repaid.

Hemming, Q.C., and *Rigby*, for the Crown, were not called upon.

Judgment.

FRY, J.:—

This is an application by the Defendant to be released from an undertaking given by counsel in Court. The action was against Colonel *Tomline* for trespass. In the view taken by me he was liable to pay damages. I stated what appeared to me to be the measure of the damages, and thereupon his counsel undertook to pay to the Secretary of War one-half of the value of the coprolites taken, and under those circumstances the Court dispensed with an account.

It is now said, and I think truly, that the undertaking was given under a mistaken belief as to the facts. The Defendant and his counsel believed that the coprolites had been sold by him, but in fact they had been sold only in the sense that he had parted with his interest and was receiving only a royalty as profit. It is to be borne in mind that this fact must have been within the knowledge of the Defendant, who was a party to the deed under which he was receiving the royalty, but it was not mentioned during the trial, nor were his counsel aware of it. Now, the judgment was not drawn up until two or three weeks after it was delivered; and the interval between the pronouncing of a judgment by consent and it being drawn up gives an opportunity to a person who has consented to anything to ascertain the true state of the facts, and he may in that interval make an application to have the judgment varied. But in my opinion, when a consent order has been drawn up, passed, and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement.

The facts were within the Defendant's own knowledge. There was in the interval between the trial and the drawing up of the judgment ample time to make inquiry. The Defendant chose not

(1) Law Rep. 2 H. L. 149.

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FRY, J. 1877 ATTORNEY-GENERAL v. TOMLINE. Judgment.

to make the inquiry, and it would now be unreasonable to allow him to set the judgment aside. I called attention to the cases of applications to rescind contracts to take shares, where it has been held that a person might, after inquiry, refuse to take the shares; so here, after the undertaking was given, inquiry might have been made in time if due diligence had been used, and the application might then have been made. In regulating the proceedings of the Court too much indulgence should not be shewn to those who have not used due diligence.

I refuse this application with costs.

Solicitor for Crown: *W. T. Perkins.*
Solicitor for Defendant: *W. F. Stokes.*

FRY, J. 1877 Dec. 11.

LLOYD *v.* JONES.

[1877 L. 94.]

Practice—Action in Chancery Division—Changing Place of Trial—Trial of Issue of Fact before Judge at Assizes without Jury—Delay—Rules of Court, 1875, *Order* XXXVI., *rr.* 5, 29—*Jurisdiction of Judge after Transfer of Action—Order* LI., *r.* 1*a* (19 *June*, 1877).

The power given to the Court or a Judge by Rules of Court, 1875, Order XXXVI., r. 29, is a discretionary one, and an order will not be made under it on the application of a Plaintiff who has unduly delayed the giving of his notice of trial, or the taking of other steps in the action:—

Semble, that after an action in the Chancery Division has been transferred for the purpose of trial or hearing to another Judge of the same Division, the Judge to whom the action was originally attached has no jurisdiction to order that an interlocutory application in the action shall be heard by the Judge to whom the transfer has been made:—

Semble, that, under Order LI., rule 1a, such an order can only be made by the latter Judge.

Statement.

THIS action was brought for the partition or sale of some land in *Denbighshire.*

The writ was issued on the 29th of June, 1876, in the *Manchester* Registry. The statement of claim was delivered on the 24th of January, 1877. The statement of defence was delivered on the 25th of May, 1877, and by it the Defendants denied the

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Plaintiffs' title, and pleaded that they were in possession of the property by themselves or their tenants as of right, and pursuant to Rules of Court, 1875, Order XIX., rule 15, the Defendants abstained from pleading their title, and the Defendants said that they did not admit any of the allegations in the statement of claim, but put the Plaintiffs to strict proof of their title.

The reply was delivered on the 9th of August, 1877.

The Plaintiffs had applied by summons in the Chambers of Vice-Chancellor *Malins* for leave to serve interrogatories on the Defendants, and this application was refused by the Vice-Chancellor just before the commencement of the Long Vacation. On the 20th of September the Plaintiffs gave notice of trial without a jury, before Vice-Chancellor *Malins*, at *Lincoln's Inn*. On the 19th of November, 1877, the Plaintiffs took out a summons in the Chambers of Vice-Chancellor *Malins*, asking that the issue of fact in the cause, whether or not the applicants were entitled as assignees or otherwise to any and what interest in the hereditaments mentioned in the pleadings, might be tried at *Chester*, before any other question of fact was tried in the action. On the 19th of November an order was made by the Lord Chancellor transferring the action for trial to Mr. Justice *Fry*. The summons was adjourned for hearing before the Vice-Chancellor personally in Chambers, and he on the 7th of December, at the request of the Plaintiffs, adjourned the hearing to Mr. Justice *Fry*, to come on with the hearing of an adjourned motion before him. This motion was one of which the Plaintiffs had on the 30th of November given notice for the 4th of December, asking that the action might stand out of the paper for hearing till the Hilary Sittings, 1878, and the hearing of this motion was on the 4th of December adjourned to the 11th of December.

The motion and the summons were in the paper to-day for hearing.

Argument.

North, Q.C., and *J. Henderson*, for the Plaintiffs:—

[FRY, J.:—It seems to me doubtful whether, under Order LI., rule 1a, the Vice-Chancellor had jurisdiction to transfer the hearing of the summons to me. I think that the Vice-Chancellor's attention should on any future application of the same sort be

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FRY, J. 1877 LLOYD v. JONES. Argument.

called to this point. But to prevent any question I will now make an order that the summons be heard by myself.]

It would be much more convenient and economical that the trial should take place at *Chester*, as most of the witnesses live in *Wales*. *Wood and Ivery, Limited*, v. *Hamblet* (1) shews that under rule 29a of Order XXXVI., the Court has jurisdiction to send the whole action for trial at the assizes.

Cozens-Hardy, for the Defendants:—

The Plaintiffs have given notice of trial before the Vice-Chancellor without a jury, and the Court will not after this lapse of time allow them to ask to have that notice varied. The application ought to have been made within four days after service of the notice of trial: Order XXXVI., rule 5; *Lascelles* v. *Butt* (2). On this ground alone the summons ought to be dismissed.

North, in reply:—

Rule 5 only deals with the mode of trial, not the place; we do not ask for a jury. We may perhaps be too late to change the mode of trial, but we only ask for a trial before a Judge at *Chester* instead of before a Judge in *London*. Rule 29 gives the Court power to make this change at any stage of the action (3).

[FRY, J.:—I think rule 29 applies. I must hear Mr. *Hardy* on the merits.]

Cozens-Hardy for the Defendants:—

The Plaintiffs having chosen a particular mode of trial must make out a strong case to have it changed. The Plaintiffs have delayed in taking every step in the action; they might have given their notice of trial in time for the last Summer Assizes. It is clear that the present application is made only for the purpose of delay. Rule 29 does not apply to a trial of the whole action.

(1) 6 Ch. D. 113.

(2) 2 Ch. D. 588.

(3) Rule 29: "In any cause the Court, or a Judge of the Division to which the cause is assigned, may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the said Act, or at the sittings to be held in *Middlesex* or *London*, and such question or issue shall be tried and determined accordingly."

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North, in reply :—

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After the issue of fact is tried the whole action will be practically settled; at any rate, the trial ought to be postponed till the next sittings, as our evidence cannot be ready before then.

Judgment.

FRY, J.:—

It appears to me very material to consider the dates of the different proceedings in the action. The writ was issued on the 29th of June, 1876; the statement of claim was delivered on the 24th of January, 1877; the statement of defence on the 25th of May; and the reply was not delivered till the 9th of August. It is said that this delay was justified by the pendency of an application by the Plaintiffs for leave to deliver interrogatories to the Defendants. That application, however, was refused by the Vice-Chancellor, and I must therefore assume that it was a wrong application; and the pendency of an application which was itself wrong cannot be any excuse to the Plaintiffs for their delay in delivering the reply. On the 20th of September the Plaintiffs gave a notice of trial before the Vice-Chancellor *Malins*, at his Court in *Lincoln's Inn*, without a jury. The Plaintiffs allowed matters to remain thus until the 19th of November, when they took out the summons before the Vice-Chancellor; and then, on the 30th of November, they gave the notice of motion before me. Is there anything which can justify me in directing that the trial shall not take place until the Hilary Sittings? The only reason assigned for my doing so is that the Plaintiffs' solicitor will not be able to get his evidence ready before then. The evidence upon the motion does not satisfy me that the Plaintiffs have used sufficient diligence to justify me in acceding to the application, and I therefore refuse to grant it. Ought I, then, under the circumstances, to grant the other application which is made by the summons, that the trial should take place at *Chester*? I hold that I have undoubtedly power, under rule 29, to do that which is asked by the summons. But the Plaintiffs might, if they had chosen to do so, have given a notice of trial to this effect—they might have addressed their notice to a trial at *Chester*. It is quite clear to my mind that, under rule 3, instead of specifying Vice-Chancellor *Malins* at his Court at *Lincoln's Inn* in the notice

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of trial, the Plaintiffs might have given notice of trial before a Judge at *Chester*. At any rate, if they could not have done that by the notice of trial itself, they might have made their present application at the time when they gave their notice of trial. They might, in my opinion, have made the application in time for the Summer Assizes, and the only reason given for their not doing so is the pendency of an application for leave to deliver interrogatories, which was itself wrong, and, as I have already said, the pendency of a wrong application can afford no excuse for delay. If I were now to grant the application, I should be allowing the Plaintiffs to postpone the trial to the Spring Assizes, when, if they had used due diligence, the trial might have been had at the last Summer Assizes. It would be unjust to the Defendants to grant the application now. I therefore refuse both the motion and the summons with costs.

Solicitor for Plaintiffs: *C. W. T. Yeilding*, agents for *Cobbett, Wheeler, & Cobbett, Manchester.*

Solicitors for Defendants: *Abbott, Jenkins, & Co.*, agents for *J. Lewis, Wrexham.*

FRY, J.
1877
Dec. 17.

STEUART *v.* GLADSTONE.

[1875 S. 247.]

Practice—Commission to take Evidence abroad—Discretion of Judge—Delay—Rules of Court, 1875, *Order* XXXVII., *r.* 1.

Issue was joined in an action on the 11th of June, and the same day it was set down for trial. On the 13th of November it was in the paper for trial, but on the Plaintiff's application, with the consent of the Defendants, the trial was postponed for a month. On the 13th of December the Plaintiff gave notice of motion for the appointment of a commission to take the evidence of himself and another witness, who were in *India*, and that the trial might be postponed until the return of the commission. At the hearing of the motion on the 17th of December the Defendants offered to consent to a postponement of the trial for two months, but this offer was declined:—

Held, that the Plaintiff was too late in making the application, and that as he had refused the Defendants' offer, the motion must be refused with costs.

Statement.

THIS cause was commenced by bill, filed on the 30th of October, 1875, in the Court of Chancery, the object being to obtain a

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declaration that a certain partnership was still subsisting between the Plaintiff and the Defendants, and that the Defendants were not entitled to expel or exclude the Plaintiff therefrom, as they had in fact done. The bill was marked with the name of Vice-Chancellor *Malins*. The business of the partnership had been carried on in *London*, *Liverpool*, *Manchester*, *Calcutta*, and *Rangoon*. The answer of the Defendants was filed on the 23rd of March, 1876. The bill was amended on the 13th of November, 1876. The Defendants' answer to the amended bill was filed on the 17th of February, 1877. Issue was joined on the 11th of June, 1877, and the same day the cause was set down for trial. On the 27th of July, 1877, the cause was by a general order of the Lord Chancellor transferred to the list of Mr. Justice *Fry*. On the 15th of August, 1877, the Plaintiff's solicitors wrote to the Defendants' solicitors that they were prepared to take the evidence by affidavit, subject to this, that as the Plaintiff was abroad, and if he should be abroad when and if the Defendants desired to cross-examine the Plaintiff, the cross-examination should be taken by commission. On the 15th of October the Defendants' solicitors replied to this letter: "We cannot agree to the proposition contained in your letter of the 15th of August as to the cross-examination by commission. Failing an agreement to take the evidence by affidavit, the action will have to be tried on oral evidence." On the 13th of November, 1877, the cause was in the paper of Mr. Justice *Fry* for trial, but on the application of the Plaintiff, and with the consent of the Defendants, the trial was ordered to be postponed for a month. On the 29th of November the Plaintiff took out a summons in the Chambers of Vice-Chancellor *Malins*, asking that the evidence of the Plaintiff and his witnesses might be taken by affidavit, or that the examination upon oath of the Plaintiff and his witnesses might be taken before a special examiner. The application was heard by the Vice-Chancellor personally, and he directed that an application should be made to Mr. Justice *Fry*, and that, in the event of his refusing to entertain jurisdiction over the application on the ground that Vice-Chancellor *Malins* had jurisdiction, the summons was to be heard before Vice-Chancellor *Malins* in Court. On the 13th of December the Plaintiff, by leave of Mr. Justice *Fry*, gave a notice of motion for the appointment

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of a special examiner for the purpose of taking the evidence of the Plaintiff and of the Defendant *Ogilvy*, who were both in *Calcutta*, or that a writ in the nature of a mandamus or commission should issue to the Chief Justice and the other Judges of the Supreme Court at *Fort William*, in *Bengal*, for the examination and cross-examination of the Plaintiff and the Defendant *Ogilvy*, and any other witnesses on behalf of the Plaintiff resident within the jurisdiction of the Supreme Court, pursuant to the Acts 13 Geo. 3, c. 63, and 1 Will. 4, c. 22, or that a commission might be issued for the purpose of taking the evidence of the Plaintiff and the Defendant *Ogilvy*, and of any other witnesses as aforesaid, and that the trial of the cause might be postponed until the return of the depositions, or until the return of the writ or commission.

Argument.

Cookson, Q.C., and *Everitt*, for the motion :—

The evidence of the Plaintiff is essential to his success, and if he is compelled to come over to this country the business which he is now carrying on in *India* will be seriously injured. It was supposed that the Defendants would consent to have the evidence taken by affidavit, and the transfer of the action to this branch of the Court has led to its coming on for trial very much sooner than was anticipated.

North, Q.C., and *F. Thompson*, for the Defendants, were not heard.

They offered to consent to a postponement of the trial to the 15th of February, 1878. This offer was, however, declined by the Plaintiff.

Judgment.

FRY, J :—

After the postponement of the trial on the 13th of November, at least the Plaintiff ought to have used his utmost diligence to be ready for the trial of the action; but, instead of doing that, the course he took was this: he did nothing from the 13th until the 29th of November. He then took out the summons before Vice-Chancellor *Malins*. The hearing was adjourned, and on the 13th of December, and not until then, did the Plaintiff give notice of the motion before me.

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Now, it is not suggested that the depositions, if they are taken in the most expeditious manner in *Calcutta*, can be returned to this country in less than something like three months from the present date. It appears to me that the Plaintiff has been unreasonably dilatory in making this application to the Court, and that he ought to have made a motion to this effect, if he desired to make it at all, shortly after the 11th of June. He has not thought fit to make it until the 13th of December. Now, I have a very strong opinion that when a Plaintiff comes to ask that the hearing of his cause may be postponed he must shew due diligence on his own part in making the application. I think it is a great hardship upon Defendants to have the hearing of causes postponed and suspended, and, so far as I am concerned, I shall always endeavour to avoid granting the indulgence of postponing a trial unless the Plaintiff has used due diligence in applying, and has some good and strong reason for seeking a postponement. If the Defendants in the present case had been minded to refuse any accommodation or assistance to the Plaintiff in the trial of the action, I should probably have granted some delay. The Defendants' counsel have, however, offered that the case should not be in the paper till the 15th of February. I think that, considering it takes only about a month for a person to come from *Calcutta* to this country, that offer is a reasonable one; and as it has been declined by the Plaintiff's counsel, although I have twice suggested that it should be accepted, and feeling as I do that the Defendants have done everything reasonable, and that what the Plaintiff is asking for is unreasonable, I must refuse this application with costs.

Solicitors for Plaintiff: *Harrison, Beal, & Harrison.*
Solicitors for Defendants: *Field, Roscoe, & Co.*

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FRY, J.

1877

Dec. 18.

LLOYD *v.* DIMMACK.

[1876 L. 251.]

Bankruptcy—Abatement—Cause of Action continuing—Rules of Court, 1875, *Order* L., *r.* 1—*Order* XVI., *rr.* 5, 17—*Form of Judgment—Accruing Damages—Lease.*

Where two of five Defendants, jointly and severally liable to the Plaintiff, had become bankrupt:—

Held, that the action might proceed against the other three Defendants without bringing the trustees in bankruptcy of the two bankrupt Defendants before the Court, or giving them notice of the proceedings.

In a suit by the assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the Court will direct merely payment on account of breaches of covenant already committed, and will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach.

Ranelaugh v. *Hayes* (1) disapproved of.

Statement.

THE Plaintiff in this action was the lessee of certain mines in *Wales*, which, by the direction of the five Defendants, he had assigned to a company, the five Defendants jointly and severally covenanting that the company would pay the rents and royalties, and observe the covenants contained in the leases, and would indemnify the Plaintiff against the non-payment of the rents and royalties, and any breach of the covenants, and as to other matters connected with the business. The company had not paid certain half-yearly rents, and had not observed the covenants in the leases, and the Plaintiff, in order to prevent the forfeiture of the mines, which formed his security for the balance of the purchase-money, had been compelled to pay these rents, and to lay out money on the mines. Further rents were due, and the lessors and others had commenced actions against the Plaintiff to recover them, and to recover damages, and in ejectment. The Plaintiff brought this action against all the five covenantors, claiming an account of what he had paid, and repayment, and that the Defendants might be ordered to pay the rents and perform the covenants.

Upon the action coming on for trial it was stated that two of the Defendants had become bankrupt since the suit was instituted.

(1) 1 Vern. 189.

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Bevir, Q.C., and *Snape*, for the Plaintiff.

Argument.

North, Q.C., and *Underhill*, for the other Defendants, submitted that the action had become abated, and could not be tried. That was the old rule under an exactly similar Order (Cons. Ord. VII., r. 2), and must still prevail. No doubt the Plaintiff might have proceeded against only some of the Defendants, but as he has chosen to make all of them Defendants he must abide by it. In *Smith* v. *Horsfall* (1) the objection prevailed. Notice ought to have been given by the Plaintiff to the trustees in bankruptcy under Rules of Court, 1875, Order XVI., rule 17. These Defendants will not give the notice.

Bevir, in reply:—

Under Order L., rule 1, the suit is not abated, and if the Plaintiff chooses to proceed against two of the Defendants only he can do so. In *Gray* v. *Lewis* (2) the objection was described as highly technical: *Perry* v. *Knott* (3).

Judgment.

FRY, J.:—

This action is against five Defendants. It is stated that two of them have recently become bankrupt, and the question is whether I am to allow the Plaintiff to go on against the three remaining Defendants or adjourn the trial for the purpose of adding the trustees in bankruptcy as Defendants, or otherwise bringing the representatives of those Defendants before the Court. That question depends upon the Rules of Court. Order L. provides that "An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties if the cause of action survive or continue." It is not denied that the cause of action does here survive or continue, and the result is that there is no abatement.

There might, however, be ground for contribution between the Defendants; and Order XVI., rule 5, provides that in such a case the Plaintiff may, at his option, join as parties to the same action all or any of the persons severally or jointly and severally liable

(1) 24 Beav. 331. (2) Law Rep. 8 Ch. 1035, 1052.
(3) 5 Beav. 293.

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on any one contract. Now this action is brought or founded on a joint and several contract, and therefore there can, in my opinion, be no doubt that the Plaintiff might have sued the three Defendants alone against whom he now proposes to proceed. But it has been argued that as he has not done so he cannot now proceed against the three alone, and for several reasons. First, because under an old order of the Court of Chancery, repeated in the Consolidated Orders (Cons. Ord. VII., r. 2), it had been held that though there might be power to select one or more of several persons liable, yet if the Plaintiff had chosen to sue all or some of them, and the suit then became defective or abated by reason of a transmission of the interest of one of them, he could not afterwards proceed against the others, and it is said that I ought, by analogy to that practice, now to hold that under the 5th rule of Order XVI. the same principle applies. I should be very sorry to encourage the gloss put by the Courts upon the old Order. The rule as to the necessity for keeping all of several Defendants before the Court was, in the opinion of the Court of Appeal, a highly technical rule, and I am not able to see very clearly what was the advantage of that rule. I think, therefore, that I ought not to import that rule, or apply it by analogy to the present Rules.

The second ground is on the 17th rule of Order XVI., as to giving notice to persons not before the Court. It is said that if I allow the action to go on against the three Defendants they will lose the benefit of that Order. The others might be persons from whom those Defendants could claim contribution or indemnity, and might therefore, by that notice, have been brought before the Court, and that the three Defendants ought not to be deprived of that right.

Now, in the first place, I am not satisfied that this is a case in which the questions in the action ought to be determined not only as between the Plaintiff and the three Defendants, but as between the three Defendants and these other persons; because I think that the three Defendants can enforce their right to contribution in the bankruptcy of the others if they have such rights. As I stated, I might have directed the trial to stand over in order to allow the three Defendants to serve notice on the trustees in bankruptcy if they wished to do so. That, however, was declined

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on the part of the Defendants, who maintained that it was the Plaintiff's duty to make the case complete by bringing these trustees before the Court. I do not think it necessary, and, the Defendants electing not to give an undertaking to serve the notice, I shall allow the trial to go on against these three Defendants.

The trial of the action then proceeded, and

Judgment.

FRY, J., after declaring that the Plaintiff must be indemnified by the Defendants, who must pay the rent due and repay the Plaintiff what he had paid, and that the Plaintiff must have his costs of the action, continued:—

The next question is whether I can give judgment in the form asked for by the Plaintiff's counsel, declaring that the Defendants are bound to indemnify according to the terms of the deed, and giving liberty to apply from time to time as breaches of the indemnity may occur. Now, in the first place, it will be observed that such a judgment would be highly inconvenient, because some of the leases are for long terms of years, and I should be giving a judgment which would require from time to time the interference of the Court over the whole residue of a term of ninety-nine years beginning in 1860. I think such a form of judgment would be highly inconvenient. In the next place, I am not aware that, with the single exception of the case of *Ranelaugh* v. *Hayes* (1), any authority can be produced for a judgment of that description. That is a case which I believe has never been actually followed. It has been cited over and over again, but the industry and learning of the counsel for the Plaintiff have not enabled them to produce a single case in which a decree has been made declaring the right to indemnity, and giving liberty to apply from time to time. Therefore, upon the ground of the great inconvenience of such a judgment, and looking at the fact that no decree can be produced from the time of *Ranelaugh* v. *Hayes* down to the present time, and looking at the not very clear report of that case, and the difficulty of ascertaining the exact circumstances, and especially what was the duration of the liability in respect of which that indemnity was declared, I feel myself bound to say that I cannot

(1) 1 Vern. 189.

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make such a declaration or give such a general liberty to apply. All I do is to direct the accounts, and that the Defendants do pay the amount to be found due on those accounts within fourteen days after the Chief Clerk's certificate.

CUR.:—Take an account of all sums of money paid by the Plaintiff, &c., and of the costs incurred by him on account of non-payment, and let the Defendants pay the Plaintiff, &c.

Inquire whether the covenants and conditions contained in the several leases in the pleadings mentioned, or any and which of them (having regard to the alterations, &c.), have been duly observed and performed by the company or by any person or persons (other than the Plaintiff) on their behalf, and whether the covenants or conditions, or any and which of the covenants and conditions contained in any and which of the said leases (having regard to such alterations as aforesaid), have or has in any and in what manner been broken or left unperformed or unobserved, and whether the Plaintiff has sustained any and what damage by reason of the breach, non-performance, or non-observance by the company of the said covenants or conditions or any and which of them (having regard to the alterations aforesaid); and let the amount of such damages (if any) be ascertained up to the date of the Chief Clerk's certificate to be made in pursuance of the judgment, and let the Defendants *J. B. Dimmack*, *D. North*, and *W. North*, or some or one of them, pay, &c.

Taxation and payment of Plaintiff's costs.

Let the Defendants, *J. B. Dimmack*, *D. North*, and *W. North*, or some or one of them, pay to the chief landlord and to the other persons who had brought actions against the Plaintiff the sums claimed by them in such actions, and the respective costs of the said actions.

Liberty to apply.

Solicitors for Plaintiff: *G. L. P. Eyre & Co.*, agents for *J. P. Lewis, Llandilo.*

Solicitor for Defendant: *H. G. Field*, agent for *H. & J. E. Underhill, Wolverhampton.*

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TILDESLEY *v.* HARPER.

FRY, J.

[1876 T. 67.]

1877

Dec. 21.

1878

Jan. 11.

Pleading—Admissions—Evasive Denial—Judgment—Leave to amend—Rules of Court, 1875, *Order* XIX., *rr.* 17, 22; *Order* XL., *r.* 11.

In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given:—

Held, that the giving the bribe was not sufficiently denied under Rules of Court, 1875, Order XIX., rule 22, and must, under Order XIX., rule 17, be taken to have been admitted; judgment for the Plaintiffs given; leave to amend the statement of defence being refused:

Held, also, that the Plaintiffs had not waived their right to judgment on the admissions by not having moved for judgment under Order XL., rule 11.

Statement.

THIS was an action by *Matthew Tildesley*, executor and trustee of the will of *Mary Hitchcocks*, and by several infants *cestuis que trust* under the will, against certain mortgagees, and against *W. H. Anderson*, a lessee, claiming to have the mortgages and the lease set aside.

As to the lease, the statement of claim stated that *Mary Hitchcocks* by her will authorized and empowered *Matthew Tildesley*, or other the trustee of her will, to demise and lease all or any part of her real estate to any person or persons for any term or number of years not exceeding twenty-one years, so that in every such case there should be reserved the most improved yearly rent that could be reasonably obtained for the same. That a part of the estate of the testatrix consisted of a freehold inn called the *Golden Fleece* and two houses behind it. That by an indenture of lease, dated the 31st of December, 1873, *Matthew Tildesley*, in alleged exercise of the power in that behalf contained in the aforesaid will, purported to lease the inn and the two houses to *W. H. Anderson* for twenty-one years at £200 a year rent. The statement of claim then stated, "When such alleged lease was granted, the Defendant *Anderson* knew that the Plaintiff *Matthew Tildesley*

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was a trustee only of the said *Golden Fleece* inn and premises with a power of leasing. The said rent of £200 was not, and both the Plaintiff *Matthew Tildesley* and the Defendant *Anderson* knew it was not, the most improved rent that at the date of such lease could have been obtained for the said premises. Such premises were at the date of such lease, as they are now, worth £350 per annum or thereabouts. The Defendant *Anderson*, however, knowing as he did that the Plaintiff *Matthew Tildesley* was in straightened circumstances at the time, offered him the said *Matthew Tildesley* personally a bonus, and in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and arranged to give him such sum of £500 if he would grant such lease, and the Plaintiff *Matthew Tildesley*, being at the time very hard pressed for money, accepted such offer and assented to such arrangement, and in fact granted *Anderson* the said lease in consideration of such bribe and in pursuance of such arrangement. And the Defendant *Anderson* has, in pursuance of such arrangement, and in fact, paid to the Plaintiff *Matthew Tildesley* £200, part of the said £500. Under the above circumstances, the Plaintiffs charge that the said lease was not granted *bonâ fide*, nor in a proper exercise of the said power of leasing, and that it is not binding on the Plaintiffs, and ought to be set aside."

The statement of defence of *W. H. Anderson* as to this matter was as follows: "The said rent of £200 was the most improved rent that at the date of such lease could have been obtained for the said premises. The Defendant *William Henry Anderson* denies that such premises were at the date of such lease worth £350 per annum or thereabouts. The Defendant *William Henry Anderson* denies that he knew that the Plaintiff *Matthew Tildesley* was in straightened circumstances at the time. The said Defendant denies that he offered the said Plaintiff personally a bonus and in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200 and arranged to give him such sum of £500 if he would grant such lease, and that the said Plaintiff being at the time very hard pressed for money or in fact accepted such offer and assented to such arrangements and in fact granted the said Defendant the said lease in consideration of such bribe and in pursuance of such arrangement. The said

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Defendant denies that he has in pursuance of such arrangement and in fact paid to the said Plaintiff *Matthew Tildesley* the sum of £200, part of the said sum of £500."

The action came on for trial, and on the claim to set aside the mortgages, the only order made was that certain deeds should be brought into Court.

The case as to the lease was then opened.

Argument.

Cookson, Q.C., and *Maclean*, for the Plaintiffs:—

The giving a bribe is, in fact, admitted, for the denial by *Anderson* as to his having given a bribe is insufficient, and is, under Rules of Court, 1875, Order XIX., rules 17, 22, an admission: *Thorp* v. *Holdsworth* (1); *Byrd* v. *Nunn* (2). There is no positive denial of any bribe having been given, and the Defendant merely says that the Plaintiffs have stated the facts inaccurately. He has answered by the card, but that is the thing directly pointed at by the 22nd rule.

Fischer, Q.C., and *Herbert Smith*, for *Anderson*:—

The denial was intended to be a complete traverse, and is so. The Defendant denies the whole case of the Plaintiffs, and the Plaintiffs cannot have been misled. There is no general allegation of bribery, and the only allegations made are denied. But even if the pleading is bad, the Plaintiffs ought to have moved under Order XL., rule 11, for judgment, when the question might have been decided. Instead of which they have replied, have put the parties to the expense of coming here with their witnesses, and now they cannot be allowed to say that the witnesses ought not to have come at all, as it is a mere question of pleading. By replying, the Plaintiffs have waived their right to raise this point.

North, Q.C., *W. W. Cooper*, *Brunskill Cooke*, and *E. B. Cooper*, for other parties.

Judgment.

FRY, J.:—

In this case the Plaintiffs sue the Defendant *Anderson* in order to have a lease of the 31st of December, 1873, declared to be

(1) 3 Ch. D. 637. (2) 5 Ch. D. 781.

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void. For that purpose they allege two grounds, each sufficient in itself. The one is that the rent reserved in the lease was not the most improved rent that *Tildesley* could have obtained for the premises, and that whereas the rent reserved is £200, the premises were at the day of the lease worth £350 per annum or thereabouts. The other is that a bribe was paid by *Anderson*, the lessee, to *Tildesley*, the trustee, who exercised the leasing power. That allegation is made in the statement of claim in these words:—[His Lordship then read the passages from the statement of claim and statement of defence.] The question now is, whether that is or is not an admission sufficient to entitle the Plaintiffs to judgment in the action, Mr. *Cookson*, for the Plaintiffs, alleging that it is such an admission, and relying upon it as such.

It will be observed that the denial here is a denial of a whole string of circumstances, and would be justified by the proof that any one of those circumstances so thrown together was not true. Now, is that the form of pleading which is required under the new rules? This is sufficiently pointed out by Order XIX., rule 22: "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance." The question then is, what is the point of substance in the allegation in the statement of claim. The point of substance is undoubtedly that a bribe was given by *Anderson* to *Tildesley*, and that point of substance is nowhere met. "Thus," the rule proceeds, "if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received." Now that illustration applies to this particular case. The denial in this present case would be true if a sum of £400, or any other sum, was offered and accepted instead of £500. The rule proceeds, "And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given." Here, as I have already pointed out, the denial is of the fact along with the circumstances which are stated in the statement of claim, and no fair and substantial answer is, in my opinion, given to the allegation of

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substance, namely, that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhered to strictly, and that the Court should require the Defendant, when putting in his statement of defence, and the Plaintiff, when replying to the allegation of the Defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule. I am convinced that it is one of the highest benefit to suitors in the Court.

Then with regard to the particular form of pleading in this case, I cannot help observing that, in my opinion, a man who had not tendered a bribe at all would never be found to make a denial in the form in which I find the denial in this case, and I say that quite independently of the rules. Supposing the rules had never existed, no honest man who had not tendered a bribe would have been contented with the denial in these pleadings. It appears to me, therefore, that I am bound to give effect to the admission contained in the pleadings.

But it is said that although there might have been an original right to rely upon that admission, yet that right has been lost, and the argument is put in this way: It is said that by Order XL., rule 11, the Plaintiffs were at liberty to apply for judgment upon the admission contained in the pleading; that the Plaintiffs have not taken that course, but have brought the cause to trial; that the Defendant has brought his witnesses into Court; that great additional expense has been incurred; and that I am bound to hold that the Plaintiffs, by not availing themselves of the order to which I have last referred, have waived their right to rely upon the admission.

Now, in the first place, it will be observed that the rule with regard to admissions is general, and that the operation of the admission is not restricted to any particular time. In the next place it will be observed that Order XL., rule 11, is merely permissive. It allows the party to the action to take the course there indicated, but does not make it incumbent upon him, and is entirely silent as to any such penalty as losing his right to rely upon ad-

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FRY, J. 1878 TILDESLEY v. HARPER. Judgment.

missions upon which he might otherwise rely. Furthermore, no case has been cited to me which has any leaning in support of the Defendant's argument in this case, and therefore I shall hold that Order XL., rule 11, is in fact, as it is in terms, permissive, and that the Plaintiffs, by not availing themselves of it, have not lost the right to rely upon the admissions contained in the pleadings. It appears to me that I may find a parallel in the practice of the old Court of Chancery. It is well known that where the Plaintiff stated on his bill a case which would not justify the Court in granting any relief at the hearing, there were two courses open to the Defendant: the Defendant might demur to the Plaintiff's bill, or he might merely take his objection by answer, and allow the matter to go on to the hearing; and although there was some vacillation in the practice with regard to the Defendant's costs, where he took that course, of late years it had been well established that the Defendant was at liberty to do so, and did not lose his right to rely upon the legal objection because he had not raised it by demurrer. And although, of course, the two cases are not the same, it appears to me that one affords a light, if light be necessary, to the proper construction of the other, and that I shall be following that light, so far as it is available, by holding, as I do, that there was no waiver of the right to rely upon the admissions, and that the Plaintiffs at the trial are entitled to rely upon the admissions. I hold that the circumstances are sufficient to entitle the Plaintiffs to ask that the lease be set aside, and I accordingly do so in favour of the Plaintiffs other than *Matthew Tildesley*, and give judgment with costs.

Fischer, Q.C., then asked for leave to amend the statement of defence. The Defendant considered that he had denied the giving of a bribe, and in an affidavit made in the action he has fully denied it.

[FRY, J.:—Issues are not to be looked for in an affidavit. The issue is derived from the pleadings.]

Anderson acted in good faith, and has spent a large sum of money on the property, and he ought not to lose it on account of a mere slip in the pleadings.

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FRY, J.:—

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I having determined that the Defendant in this case has made an admission in his pleadings which entitles the Plaintiffs to judgment, Mr. *Fischer* has applied on behalf of the Defendant to deprive the Plaintiffs of the whole of that benefit by amendment of the pleadings.

Now, undoubtedly, the power of the Court with regard to amendment is unlimited, that is to say, it is only limited by what is right and proper; but, as a general rule, I should be exceedingly unwilling to allow an amendment which would deprive the Plaintiff of the benefit of a substantial admission, such as there has been in this case if I am right in my previous judgment.

The reason why I should be exceedingly unwilling to deprive the Plaintiffs of the benefit of such an admission is this, that if that were the course or practice of the Court, it would deprive the suitors of the great benefit intended for them by the Rules of Court, which enable the Plaintiff to rely on admissions. If there were any danger of the admission being set aside at the hearing of the cause, it would be incumbent upon the Plaintiff to prepare his brief, and to prepare his case for trial, and to have his witnesses in Court, just as if such admission did not exist. That course would involve greatly increased expense, and therefore it appears to me expedient that where a substantial admission is made, the Plaintiff should be able to anticipate that he may rely upon it at the hearing.

But then it is said that the course open to the Plaintiffs was to proceed under Order XL., rule 11, and that, if they have not done so, and have allowed the matter to go on for trial, it is reasonable that the trial should proceed. How far that might be the case in other circumstances it is not necessary now to decide. It appears to me that the Plaintiffs had a real reason in the present circumstances, and a real justification, for not proceeding to move for judgment under that rule. [His Lordship then stated the facts of the case as to the mortgage, coming to the conclusion that the Plaintiffs could not have the whole benefit of the admissions until the case as to the mortgages had been determined.] I think, therefore, that the Plaintiffs were justified in not proceeding under Order XL., and therefore, whatever course I might pursue in other

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FRY, J. 1878 TILDESLEY v. HARPER. Judgment.

cases, I must in this case act upon the general principle to which I have adverted, and decline to deprive the Plaintiffs of the benefit of the admission in the Defendant's pleadings, by altering the pleadings so as to take away that admission. The Plaintiffs, in my mind, were justified in coming here into Court without a single witness, and, for aught I know, they have taken that course.

I should, therefore, be wrong if I were to alter the pleadings and enable the Defendant now to set up the whole of the case, and I therefore decline to allow the amendment. I give judgment for the Plaintiffs.

Solicitor for Plaintiffs: *R. Charles.*
Solicitors for *Anderson*: *Rickards, Walker, & Co.*
Solicitors for other Defendants: *Pickett & Mytton.*

FRY, J. 1878 *Jan.* 15.

JAMES *v.* CROW.

[1876 J. 154.]

Practice—Non-appearance of Plaintiff at Trial—Proof by Defendant of Service of Notice of Trial—Rules of Court, 1875, *Order* XXXVI., *rr.* 10, 19.

When an action is called on for trial and the Plaintiff does not appear, the Defendant appearing is entitled to have judgment in his favour with costs, without proving that he has been served with notice of trial.

Robson v. *Robson* (1) and *Ex parte Lows* (2) followed.

Cockle v. *Joyce* (3) not followed.

Statement.

THIS action was in the list of actions for trial this day. When it was called on in its turn no one appeared on behalf of the Plaintiff.

Argument.

De Courcy Atkins, for one of the Defendants, asked that judgment might be given for him with costs, and submitted that, notwithstanding the decision in *Cockle* v. *Joyce* (3), it was not necessary for the Defendant to prove that he had been served with notice of trial: Rules of Court, 1875, Order XXXVI., rr. 10, 19; *Robson* v. *Robson* (1); *Ex parte Lows* (2). In the latter case the

(1) 22 Sol. J. 70. (2) *Ante*, p. 160.
(3) *Ante*, p. 56.

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Appellant in a bankruptcy appeal did not appear when it was called on, and the Court of Appeal held that the Respondent was entitled to have the appeal dismissed with costs, without proving that he had been served with notice of the appeal.

Judgment.

FRY, J.:—

When *Cockle* v. *Joyce* (1) came before me I was at first disposed to think that the Defendant need not prove that he had been served with notice of trial. But I was told by the Registrar that the practice was to require proof of the service. *Ex parte Lows* (2), however, appears to be a case in point, and upon the authority of that decision I now hold that the Defendant need not prove that he has been served with notice of trial, and I give judgment for him with costs.

Solicitor for Defendant: *E. Draper.*

ELDRIDGE *v.* BURGESS.

[1876 E. 50.]

Practice—Abatement—Bankruptcy of sole Plaintiff—Non-appearance of Plaintiff or of Trustee at Trial—Rules of Court, 1875, *Order* XXXVI., *r.* 19; *Order* L., *r.* 1.

After issue had been joined and notice of trial given by the sole Plaintiff in an action, he filed a liquidation petition, under which a trustee of his property was appointed. When the action came on for trial no one appeared for the Plaintiff or for the trustee, and there was no evidence that any notice of the action had been served on the trustee:—

Held, that rule 1 of Order L. of Rules of Court, 1875, applies only when the cause of action survives or continues in some person who is before the Court; that the action had abated, and that the only order which could be made was to strike the action out of the list.

Statement.

THIS was an action for the specific performance of an agreement by the Defendant for the sale of a house to the Plaintiff. Issue was joined on the 23rd of February, 1877, and on the 29th of March the Plaintiff gave notice of trial. On the 26th of May the

(1) *Ante*, p. 56. (2) *Ante*, p. 160.

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FRY, J. 1878 ELDRIDGE v. BURGESS.

Plaintiff filed a liquidation petition, under which a trustee of his property was appointed on the 18th of June. The action stood in the list for trial this day. When it was called on in its turn, no one appeared on behalf of the Plaintiff or the trustee. Ther was no evidence that any notice of the action had been served on the trustee.

Argument.

Ingle Joyce, for the Defendant:—

The action has not abated, for the cause of action "survives or continues" within the meaning of rule 1 of Order L. of Rules of Court, 1875.

[FRY, J., referred to *Jackson* v. *North Eastern Railway Company* (1).]

The Defendant might have moved upon notice to the trustee to dismiss the action, and then an order could have been made, as was done by the present Master of the Rolls in *Wright* v. *Swindon, &c., Railway Company* (December 1, 1876), dismissing the action with costs, the Defendant undertaking not to enforce the payment of costs against the Plaintiff personally, but only against his estate in the liquidation. No such motion has, however, been made, but the Court can now simply give judgment for the Defendant without costs: Order XXXVI., r. 19. This cannot prejudice the trustee, and it will clear the Defendant's title to the property.

Judgment.

FRY, J.:—

I think that rule 1 of Order L. applies only to a case where the cause of action "survives or continues" in some person who is before the Court. In the absence of the trustee I can only order the action to be struck out of the list.

Solicitor for Defendant: *Thomas Fortune*, agent for *C. H. Binsteed, Portsmouth.*

(1) 5 Ch. D. 844.

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CHILD *v.* STENNING.

FRY, J.
1878
Jan. 23.

[1876 C. 227.]

Practice—Hearing—Several Defendants—Alternative Relief—Costs—Rules of Court, 1875, *Order* XVII., *rr.* 1, 8.

The Plaintiff, lessee of land, brought an action against the lessor and against other lessees, who claimed a right of way over the Plaintiff's land, denying the right, and claiming an injunction against them; or, if the Court should hold that they had under their lease a right of way, then damages from the lessor:—

Held, that the Plaintiff was not at the hearing bound to elect against which of the Defendants to proceed, but that the counsel of the lessor might support the case of the Plaintiff against the other lessees.

Judgment having been given for the other lessees, establishing their right of way, and the Plaintiff's right to indemnity from the lessor being then admitted:—

Held, that nevertheless the lessor would not be ordered to pay to the Plaintiff the costs incurred by making the other lessees Defendants.

Statement.

THE Rev. *A. D. Wagner*, by an agreement made in December, 1865, agreed to grant to the lessors of *J.* and *A. Stenning* a lease for ninety-nine years of certain land at *Brighton*. By another agreement made in May, 1874, Mr. *Wagner* agreed to demise to *S. Child* a piece of land adjoining the land so demised to *J.* and *A. Stenning*, and on the 24th of August, 1876, an indenture of demise, with the usual covenants, was accordingly made between Mr. *Wagner* and *Child*. *J.* and *A. Stenning* claimed under the first agreement a right of way over the piece of land demised to *Child*, and *Child* brought this action against Mr. *Wagner* and *J.* and *A. Stenning*, claiming an injunction and damages against *J.* and *A. Stenning*, and in the alternative, if the Court should be of opinion that *J.* and *A. Stenning* were entitled to a right of way, then for damages against Mr. *Wagner* under the covenant for quiet enjoyment in the lease to *Child*.

The case is reported on demurrer (1).

The action now came on for trial.

Argument.

Cookson, Q.C., and *Morshead*, for the Plaintiff, opened the Plaintiff's case.

(1) 5 Ch. D. 695.

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FRY, J.
1878
CHILD
v.
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Argument.

Kekewich, Q.C., and *Fellows*, for Mr. *Wagner*, the last Defendant on the record, asked that the Plaintiff might now elect against which of the Defendants to proceed. The Plaintiff must make one case or the other; if the Plaintiff is right against *J.* and *A. Stenning*, there is no case against Mr. *Wagner*. The Rules of Court, 1875, Order XVII., never intended Defendants to be placed in such a position.

North, Q.C., and *J. T. Humphry*, for *J.* and *A. Stenning*, claimed to be heard as standing first on the record.

Judgment.

FRY, J.:—

The question I have to determine is new, and is as to the proper mode of trial where the Plaintiff seeks relief in the alternative against two sets of Defendants.

The case against the *Stennings*, two of the Defendants, is, that they have no right on the land at all, and are trespassers, and the Plaintiff claims against these Defendants an injunction and damages. The case against the other Defendant, Mr. *Wagner*, is, that if the *Stennings* have a right of way over this land, then Mr. *Wagner*, under his covenant for quiet enjoyment, is liable to indemnify the Plaintiff. On the first question, therefore, both the Plaintiff and Mr. *Wagner* are interested in shewing that the *Stennings* have no right of way.

The case of the Plaintiff has been very fully opened, and now Mr. *Kekewich*, for Mr. *Wagner*, says that the Plaintiff must elect which Defendants to go on against, and cannot beyond this stage of the proceedings retain both sets of Defendants. In my opinion that is not the full extent of the right given to a Plaintiff by the Rules of Court, especially when I bear in mind the decision on the demurrer in this case; and I think that the Plaintiff is entitled to retain both sets of Defendants. I think that Mr. *Wagner's* counsel should now be allowed to address the Court in support of the Plaintiff's case, and to cross-examine the Plaintiff's witnesses. Whether they will be allowed to address the Court again, and in support of their own case against the Plaintiff, will be matter for consideration hereafter.

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Kekewich declined to address the Court in support of the Plaintiff's case against *J.* and *A. Stenning*.

The trial then proceeded, and his Lordship held, on the construction of the demise to the lessors of *J.* and *A. Stenning*, that they had the right of way claimed by them, and gave judgment for them with costs.

Kekewich, for Mr. *Wagner*, then admitted the right of the Plaintiff to indemnity, and the damages were assessed at £400.

His Lordship refused to order Mr. *Wagner* to pay to the Plaintiff the costs he had incurred by making *J.* and *A. Stenning* Defendants.

Solicitors for Plaintiff: *Smith, Fawdon, & Low*, agents for *Lamb, Brighton.*

Solicitors for Defendants: *Tamplin & Co.*, agents for *Verrall, Brighton; Stibbard & Co.*, agents for *Woods & Dempster, Brighton.*

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C. J. B.

1877

Dec. 10.

In re SHIERS. *Ex parte* SHIERS.

Composition—First Instalment paid by Sureties—Failure to pay Second Instalment—Rights of Creditors—Bankruptcy Act, 1869, *s.* 126.

The creditors of a debtor passed resolutions accepting a composition of 5*s.* in the pound, payable in two instalments of 4*s.* and 1*s.*, the first instalment to be paid in five months, and to be secured by the promissory notes of the debtor and three sureties; the second instalment to be paid in two years, and to be secured by the promissory notes of the debtor alone. The first instalment was paid by the sureties, and exceeded in amount the assets of the debtor as appearing by his statement of affairs. The debtor, having failed to pay the second instalment, was adjudicated a bankrupt on the application of a creditor under the 126th section:—

Held, on appeal, that the adjudication could not be sustained, for that the creditor failed to shew that there were legal difficulties, or that the creditors were prejudiced; and that the remedy of the creditor was to sue at law for the remaining instalment of the composition.

Statement.

THIS was an appeal from a decision of the Registrar, sitting as deputy Judge, of the *Manchester* County Court.

On the 15th of June, 1875, *A. Shiers*, a trader, filed his petition for liquidation. His debts were £8556 0*s.* 1*d.*; his estimated assets, exclusive of a doubtful debt of £1903 0*s.* 3*d.* due from his brother in *Africa*, were £1559 1*s.*

The first meeting of his creditors was held on the 7th of July, 1875, when an offer by the debtor to pay a composition of 3*s.* in the pound, and to assign to a trustee for the creditors the debt due from his brother, was not accepted, and the meeting adjourned. The adjourned meeting was held on the 21st of July, when the debtor offered to pay 4*s.* in the pound, and to assign his brother's debt to a trustee for the creditors, but this was declined. Ultimately the creditors passed resolutions accepting a composition of 5*s.* in the pound in satisfaction of their debts, such composition to be payable in two instalments of 4*s.* and 1*s.*, and to be paid respectively at the end of five months and two years from the date of the registration of the resolutions, and the first instalment to be secured by the joint and several promissory notes of the debtor and three sureties, and the second instalment by the promissory notes of the debtor alone. These resolutions were duly confirmed

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and registered, and the sureties were approved, and the promissory notes were distributed amongst the creditors.

The reason the creditors declined an assignment of the debt of £1903 0*s.* 3*d.* was that they thought the debtor was the most likely person to obtain payment from his brother of the debt, and they allowed two years for the payment of the second instalment of the composition in order to enable the debtor to take proceedings to recover the debt.

Statement.

The first instalment of the composition, which amounted to £1717 4*s.*, thus exceeding the debtor's estimated assets by £158, was paid by the sureties.

On the second instalment falling due the debtor wrote to his creditors, stating, as the fact was, that he had failed to recover anything from his brother, and was unable to pay the instalment, and asking for further time.

M. Blakeley, a creditor, the second instalment of whose debt amounted to £13, thereupon applied to the County Court, under sect. 126, for an adjudication of bankruptcy against the debtor, and the Registrar, acting as deputy Judge, made the order, on the ground that the composition could not proceed without injustice and undue delay to the creditors. The debtor appealed.

Argument.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

The creditors accepted the promise of the sureties and the debtor in satisfaction of their debts, and the sureties having paid the instalment they guaranteed, there has been, as regards them, complete accord and satisfaction, and the creditors cannot now repudiate the composition and sue for their original debts, because the composition has not failed: *In re Hatton* (1). This distinguishes the case from *Ex parte Charlton* (2), where neither the debtor nor the sureties paid a sixpence. There is, therefore, no composition pending on which the Court can act, and the creditor must be left to his common law right of action for the £13 now due to him. Further, the power vested in the Court under the 126th section to adjudicate a compounding debtor a bankrupt is discretionary, and we submit that in this case that discretion has not been wisely exercised.

(1) Law Rep. 7 Ch. 723, 726.

(2) 6 Ch. D. 45.

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De Gex, Q.C., and *Linklater*, for the Respondent:—

The bargain was that if the debtor paid a composition of 5*s.* in the pound he should be a free man. They did not accept the promise to pay the 5*s.*, but the 5*s.* It is an agreement to take the money and not the promissory notes, and therefore there can be no accord and satisfaction unless the whole resolution is performed; and the debtor having failed to perform his part, the creditors are remitted to their original rights, and also to their right under the 126th section, to have an adjudication: *Ex parte Charlton* (1). Further, there has been undue delay. The debtor has had two years to pay 1*s.* in the pound, and yet asks for further time; but as the sureties paid the first instalment, what has become of the £1550 of assets shewn by the debtor's statement of affairs? We submit that it was time that the Court should interfere and take upon itself the administration of this debtor's estate.

Judgment.

BACON, C.J.:—

There are no grounds whatever upon which this adjudication can be sustained. The composition proceedings seem to have been conducted with fairness in every respect. The creditors, at the first meeting, had the debtor's statement of affairs before them, and seeing the amount of the debts and assets, and being told of this large claim against the brother abroad, they preferred to take the security for the 5*s.* in the pound, and to leave the debtor to do what he could with his brother's debt. What was the result? The debtor was a free man, and was at liberty to continue his business, and he did so, and traded as any other man would who had not failed. The first instalment of 4*s.* in the pound was duly paid, but he was unable to pay the second instalment of 1*s.*, in consequence of not having succeeded in getting the debt due from his brother. Then here is a creditor for £13 who is content to stand by for two years, and now comes and asks the Court that, in justice to the creditors, the debtor may be adjudicated a bankrupt in order that he may examine the bankrupt's books and investigate all his dealings. I cannot conceive a more unjust proceeding. It is plain that the 126th section gives the Court a discretionary power to

(1) 6 Ch. D. 45.

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adjudicate a debtor a bankrupt "if by reason of legal difficulties"—there are none here—"or for any sufficient cause"—there is none shewn—"the composition cannot proceed without injustice or undue delay to the creditors." Legal difficulties there are certainly none, because the creditor could have had recourse to his common law remedy and could sue in the County Court for his £13, and yet, after waiting two years, he goes to the County Court and gets the debtor adjudicated a bankrupt for the purpose, as he says, of investigating his books and transactions. In my opinion no sufficient cause has been shewn, and I decide that this is not a discreet exercise of the power or authority vested in the County Court Judge. Without confounding this case with *Ex parte Charlton* (1), to which it has no resemblance or analogy whatever, I am of opinion that this is a wholly unjust and unrighteous proceeding on the part of this creditor, and that the order of the Court below must be discharged, and the Appellant will have his costs here and in the Court below.

Solicitors for Appellant: *Pritchard, Englefield, & Co.*, agents for *Storer, Manchester.*

Solicitors for Respondent: *Layton & Jaques*, agents for *J. Richardson & Son, Manchester.*

In re IRVING. *Ex parte* BRETT.

C. J. B. 1877 *Nov.* 12.

Chose in Action—Equitable Assignment—Undertaking to "pay over" Dividends on a Proof—Notice—Bankruptcy Act, 1869, *s.* 15, *sub-s.* 5.

A., for good consideration, gave *B.* a written undertaking to "pay over" to him all dividends that he should receive on his proof against a bankrupt's estate. *A.* became bankrupt and *B.* then gave notice of his claim to the trustees in the first bankruptcy:—

Held, that there was a good equitable assignment of the dividends, and that *B.* was entitled as against *A.'s* trustee in bankruptcy.

Statement.

THIS was an appeal from a decision of the County Court Judge of *Cumberland.*

On the 12th of February, 1874, *John Irving* filed a liquidation

(1) 6 Ch. D. 45.

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C. J. B. 1877 *In re* IRVING. *Ex parte* BRETT.

Statement.

petition. His creditors resolved on liquidation by arrangement, and appointed *J. Reddish* trustee.

The debtor was jointly indebted with one *W. Bushby* to the *Carlisle Bank* on two bills for £500 and £300.

On the 15th of August, 1874, *Bushby* arranged with the bank to pay them £300 in cash, and give them a new bill for £500, which they undertook not to sue upon in consideration of his proving for the two bills against *Irving's* estate and paying them the dividends when received. Accordingly the same day *Bushby* paid the £300, and wrote the bank as follows:—"I hereby undertake that I will, when and as received, pay over to you all dividends coming to me in respect of my proof for £800 upon the estate of Mr. *John Irving*."

In reply the bank manager wrote:—"I have received your note on demand for £500 dated the 15th instant, and your undertaking to pay over to the bank the dividends on your proof for £800 on the estate of Mr. *John Irving* as and when received, and on the part of the bank I undertake not to make any claim or demand in respect of the said note unless default is made in the terms of your said undertaking, and to hand over the said note to you when a final dividend has been paid."

On the 28th of August, 1874, *W. Bushby's* proof for £809 9*s.* 6*d.* against *J. Irving's* estate was admitted.

On the 19th of February, 1876, *W. Bushby* was adjudicated a bankrupt, and on the 15th of April following *H. Brett* was appointed trustee of his estate.

On the 31st of March, 1876, the *Carlisle Bank* gave notice to *J. Reddish* that they claimed the dividends on *W. Bushby's* proof under the letter of the 15th of August, 1874.

On the 14th of June, 1876, a dividend of 4*s.* 5½*d.* was declared on *J. Irving's* estate.

On the 9th of July, 1877, the County Court Judge ordered *J. Reddish* to pay over to the *Carlisle Bank* the dividends on *W. Bushby's* proof.

H. Brett appealed.

Argument.

De Gex, Q.C., and *H. Hodgson*, for the Appellant:—

The assignee of a *chose in action* must give notice to the debtor

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C. J. B. 1877 *In re* IRVING. *Ex parte* BRETT. Argument.

to perfect his title: *Bradley* v. ——— (1). Here no notice was given until after the bankruptcy, and more than two years after the alleged assignment.

[BACON, C.J.:—Under the old law notice was necessary to take a *chose in action* out of reputed ownership, but since the Act of 1869 this is not so.]

The letter constitutes merely a conditional undertaking or promise which was countermandable: *Field* v. *Megaw* (2); *Malcolm* v. *Scott* (3); *In re Rawbone's Trusts* (4).

Winslow, Q.C., and *Dauney*, for the Trustee:—

The letter of the 15th of August was a good equitable assignment of the dividends: *Rodick* v. *Gandell* (5); *Riccard* v. *Prichard* (6). In *Field* v. *Megaw* they failed to prove any agreement to pay out of a particular fund; so, too, in *Malcolm* v. *Scott*. *Bradley* v. ——— is not consistent with later authorities. *In re Rawbone's Trusts* is really not in point; and, if it were, it has been questioned in *Ex parte Ford* (7).

[They also referred to *Ex parte Flower* (8); *Fisher* on Mortgages (9).]

De Gex, in reply, cited *Fisher* on Mortgages (10).

BACON, C.J.:— Judgment.

This is a case of the clearest character. The facts agreed upon are these: The bank were the holders of the joint and several promissory notes of two persons for £300 and £500. One of them becomes bankrupt. Under these circumstances the solvent party approaches the bank and offers terms, and they say, If you will pay us £300 in cash, and prove on the two bills and pay us the dividends you receive, we will let you off the payment of the bill for £500. That is the bargain, and he agrees to it. The result is that the bank are the only persons interested in the proof.

(1) Ridg. Ca. in Ch. 194.
(2) Law Rep. 4 C. P. 660.
(3) 3 Hare, 39.
(4) 3 K. & J. 476.
(5) 1 D. M. & G. 763.
(6) 1 K. & J. 277.
(7) 1 Ch. D. 521.
(8) 4 Dea. & Ch. 449.
(9) 3rd Ed. p. 81.
(10) 3rd Ed. p. 82.

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C. J. B. 1877 *In re* IRVING. *Ex parte* BREET. Judgment.

He makes the proof. It is admitted, and he is entitled to the dividends when they are declared. What is that but a *chose in action?* and he binds himself to pay over to the bank those dividends when he receives them. He does not promise, as in the cases that have been cited, that he will pay them out of an uncertain fund, but he undertakes to pay over the very fund itself, and yet it is doubted whether that is an equitable assignment. The letter does not create a charge or lien on the dividends, but it is a good equitable assignment of the entire dividends. The bank gave *Bushby* the means of making his proof by giving him the bills, and he took them upon his undertaking to pay over the dividends he should receive. If he had refused to hand over the dividends to the bank they could without doubt have compelled him to perform his undertaking. In my opinion, therefore, there is no ground for saying that the bank are not entitled to this dividend. It is clear that *Bushby*, at the time of his bankruptcy, was entitled to this *chose in action*, but it was subject to a trust to hand it over to the bank when received. No question of order and disposition, therefore, arises, that being disposed of by sect. 15 of the Act of 1869, and the case is simply this, that *Bushby* was the assignor to, and at the same time the trustee for, the bank of these dividends. In my opinion, therefore, the order appealed against is right, and is consistent with all the authorities. The appeal must be dismissed with costs.

Solicitor for Appellant: *W. J. Foster.*
Solicitor for Respondent: *C. Bendle.*

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WIDGERY *v.* TEPPER.

C. A. 1877 Dec. 6, 7.

[1874 W. 90.]

Wife's Chose in Action—Sale by Husband—Reduction into Possession—Right to set aside Sale—Decree in former Suit—Bill of Review.

W., being entitled in right of his wife to a share of certain engravings which were in the hands of *T.* as agent for the parties entitled, sold his wife's share to *T.*, subject to a stipulation that six engravings should be delivered to him in specie. He received the purchase-money, but the six engravings were not delivered. The owners of other shares made similar sales to *T.* *W.* died in the lifetime of his wife. The engravings remained in *T.*'s possession till his death, and were sold in a suit for the administration of his estate. *W.*'s executors after this filed a bill to set aside the sale of Mrs. *W.*'s share as obtained by fraud:—

Held (affirming the decision of *Malins*, V.C.), that *W.*'s executors, and not the executors of the surviving wife, were the proper persons to sue.

In the administration suit an inquiry was directed what interest *T.* had at his death in the engravings in question, and if interested as owner, to what extent, and whether he became such owner as trustee, legatee, purchaser, or otherwise. In answer to the inquiry it was found that *T.* became entitled as purchaser, subject to the delivery of six of the engravings to each of the vendors, and that such delivery had been made under an order in the suit. *W.*'s executors were parties to these proceedings in respect of their right to the six engravings. An order on further consideration was made treating *T.* as owner, which was afterwards inrolled. The question of fraud had not been raised:—

Held (affirming the decision of *Malins*, V.C.), that this decree did not interfere with a bill to set aside the sale for fraud.

Statement.

THIS was a suit by the personal representatives of *John Widgery* to set aside a sale by him of a share to which his wife had been entitled as one of the five next of kin of *J. M. W. Turner*, R.A., in certain engravings.

By a decree made in 1856 it was declared that the engravings in question belonged as to one-fifth to *J. Widgery* and *M. A. Turner*, his wife, in her right, and as to the other four-fifths to the four other next of kin in equal shares, and it was ordered that they should be delivered to *Jabez Tepper* on behalf of the next of kin, he being one of such next of kin and acting as the solicitor in the suit for the others. The engravings were delivered to him accordingly.

In January, 1858, *Jabez Tepper* proposed to the persons entitled

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C. A. 1877 WIDGERY v. TEPPER. Statement.

to the other four shares in the above engravings, to purchase their shares, the price of each share to be £500, in addition to which the vendor of each share was to have six of the engravings. Three of the next of kin, including *Widgery* and his wife, accepted the offer and received the prices of their shares, but the six engravings to each were not delivered. The persons entitled to the remaining fourth share declined to accept the offer. The engravings remained in the possession of *Jabez Tepper* till his death, which took place in 1872.

Widgery died in 1861. His wife survived him, and died in 1871.

In January, 1872, a creditor's suit, *Turner* v. *Turner*, was commenced for the administration of the estate of *Jabez Tepper*, and in the same month a decree was made for administration, which contained an inquiry of what *Jabez Tepper's* estate consisted, and an inquiry whether his estate was subject to any liability to the parties interested in the estate of *J. M. W. Turner*, in respect of his occupation of a leasehold house of *Turner's* and the engravings or property therein. The engravings thus referred to were the engravings in question. On the 18th of June, 1872, an inquiry was added, what interest *Jabez Tepper* had in the engravings, &c., in his possession at the time of his decease, formerly part of the estate of *J. M. W. Turner*, and, if interested as owner, to what extent, and whether he became such owner as trustee, or legatee, or purchaser, or otherwise, and who were then the persons interested therein. The decree was served on *Widgery's* executors as interested in respect of the six engravings, which were of considerable value.

On the 9th of August, 1872, an order was made in *Turner* v. *Turner*, at the making of which *Widgery's* executors were represented, by which it was, among other things, ordered that six engravings, to be selected by the Chief Clerk from among the above engravings, should be delivered to *Widgery's* executors in satisfaction of all claim by them for non-delivery of six engravings in part payment for the share of *Widgery* in right of his wife in the engravings sold to *Jabez Tepper*. Early in 1873 the Plaintiffs received the six engravings accordingly, and gave a receipt for them.

On the 20th of February, 1873, the Chief Clerk made his cer-

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tificate in *Turner* v. *Turner*, whereby he certified that *Jabez Tepper* was at his death entitled to the engravings; as to four-fifths thereof beneficially, subject to the delivery of six engravings to each of the next of kin who had sold their shares, and as to the remaining fifth, as a trustee for the representatives of that one of the next of kin whose share had not been sold; and he proceeded to certify further that the six engravings had since been delivered.

Statement.

On the 8th of March, 1873, the cause of *Turner* v. *Turner* came on for further consideration, *Widgery's* executors appearing, and an order was made declaring *Samuel Tepper* entitled to the whole of the personal estate of *Jabez Tepper*, and authorizing a sale of the engravings.

The above orders were inrolled.

The engravings were sold accordingly at different times from March, 1873, to March, 1874, and realized a gross amount of £35,862. In April, 1874, the bill in this cause was filed to impeach the sale to *Samuel Tepper* as regarded Mrs. *Widgery's* share.

The Defendants, by their answers, insisted, among other things, that as the wife had survived the husband, her representatives, and not his, were the proper parties to impeach the sale, and that even if the Plaintiffs had a *locus standi*, the inrolled orders in *Turner* v. *Turner* debarred them from relief. Vice-Chancellor *Malins* overruled these objections, and made a decree in favour of the Plaintiffs (1). From this decree *Tepper's* executors and Mrs. *Widgery's* executors appealed.

Argument.

Glasse, Q.C., and *Bristowe*, Q.C., *C. H. Turner*, and *T. A. Roberts*, for the Appellants, on the question as to the *locus standi* of the Plaintiffs, cited, in addition to the authorities referred to below, *Harwood* v. *Fisher* (2).

J. Pearson, Q.C., and *W. Karslake*, for the Respondents, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

In my judgment this is a clear case. Certain chattels were

(1) 5 Ch. D. 516. (2) 1 Y. & C. Ex. 110.

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delivered to *Tepper* on behalf of himself and the other next of kin, of whom Mrs. *Widgery* was one. Mr. *Widgery* sells to *Tepper* his wife's share of them, and receives the purchase-money. If reduction into possession of chattels of this kind is necessary, there was here a clear reduction into possession.

Judgment. Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion, and entirely concur in the reasons given by the Vice-Chancellor in his judgment.

Thesiger, L.J.

THESIGER, L.J., concurred.

Argument resumed.

Argument.

The question as to the title to these engravings was put in issue in proceedings to which the present Plaintiffs were parties, and the orders establishing the title of *Jabez Tepper* have been inrolled.

[JAMES, L.J.:—How can an inquiry in an administration suit what a man's property consisted of interfere with a bill alleging that part of that property was obtained by fraud?]

There is a direct decree *in rem* properly pleadable.

[JAMES, L.J.:—Was there any judicial determination in *Turner* v. *Turner* upon the question of fraud?]

The contract was in issue.

[BAGGALLAY, L.J.:—For the purpose of this objection we must consider that fraud was discovered after the decree.]

Then a bill of review is necessary.

J. Pearson, Q.C., and *W. Karslake*, for the Plaintiffs, were not called upon.

James, L.J.

JAMES, L.J.:—

In my opinion there is nothing in the objection. The two suits were totally different in their nature and object. In the first suit an inquiry was directed as to the ownership of the property, and in answer to that inquiry it was found that *Tepper* was owner of it

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by purchase. So long as the purchase was not impeached he was so, and the validity of the purchase never having been in issue in that suit, a decree treating him as so entitled does not interfere with any right to set the purchase aside as brought about by fraud.

BAGGALLAY, L.J.:— (Judgment, Baggallay, L.J.

I am of the same opinion. *Turner* v. *Turner* was a suit simply for the purpose of ascertaining what property *Tepper* had applicable to payment of his debts, and to have it applied in paying them. At that time the present Plaintiffs, who had been served with notice of the decree and attended the proceedings, were ignorant of their rights, and not in a position to raise the present questions. If further proceedings had to be taken in *Turner* v. *Turner* for the purpose of getting the benefit of the decree in this suit (assuming it to be affirmed), then it would be necessary to take proceedings in the nature of a bill of review.

THESIGER, L.J.:— Thesiger, L.J.

I cannot find that this matter was in issue in the former suit. The inquiry was not directed to the question of fraud, but only to the extent of *Tepper's* interest in the property, and how he acquired it, whether as trustee, legatee, or purchaser. The present suit proceeds entirely on the ground of fraud, which was not before the Court in the other suit.

The argument then proceeded on the merits, and in the result the appeal was dismissed with costs.

Solicitors: *Whitakers & Woolbert; J. Turner & Son; Guscotte, Wadham, & Daw.*

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C. A. 1877 Dec. 17.

EVERETT *v.* EVERETT.

[1874 E. 33.]

Wills Act (1 *Vict. c.* 26), *s.* 24—*Will speaking from Death—Release of all Debts due to Testator.*

A testator, after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator:—

By a codicil the testator released the son from another specified debt for moneys misappropriated by the son:—

Held (reversing the decision of *Malins*, V.C.), that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by the testator between the date of his codicil and of his death.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

William Everett, by his will, dated the 22nd of March, 1872, disposed of considerable property for the benefit of his two sons and two daughters and the widow and children of a deceased son; and among other things he gave all his interest as mortgagee in a leasehold messuage and premises situate in *Piccadilly*, and in the mortgage debt and interest secured to him thereon, to trustees in trust for his son *Frederick Everett* for life, and after his death for the benefit of his wife and children. The will then contained the following clauses: "Whereas by a certain mortgage or conditional bill of sale bearing date, &c., certain paintings, goods, and chattels were assigned to me by the said *Frederick Everett* to secure the repayment of £800 in manner therein mentioned; and whereas by a certain memorandum of deposit bearing date, &c., the said *Frederick Everett* deposited with me a certain policy of insurance effected on his life in the *Alliance Assurance Company* as a security for the payment to me of any sums of money which I may pay or in any manner render myself liable to pay on behalf of my said son not exceeding £300; and whereas, by a certain memorandum

(1) 6 Ch. D. 122.

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of deposit, my said son deposited with me two several bonds of one *Henry Elton* to secure a certain sum of money lent and advanced by me to him; and whereas I have since caused such bonds to be cancelled; and whereas I have lent and advanced unto my said son various other sums of money, and he is now indebted to me in divers sums of money in respect thereof; and whereas I am desirous that he, his executors and administrators, shall be discharged and relieved from the said several hereinbefore mentioned sums of money, and that neither he nor they should be required to pay the same, or any part thereof, to my said estate, and that the several securities now held by me in respect of the said several last-mentioned moneys should be restored and given up to him, or in the event of his dying before me, then to his executors or administrators for the benefit of his estate, as hereinafter mentioned; Now I do hereby give and bequeath unto my said son *Frederick*, and if he should predecease me, then to his executors or administrators for the benefit of his estate, all and several the aforesaid several moneys, together with the several paintings, policy, bonds, goods, and chattels, and all other effects now in my custody, possession, or power relating thereto." And after giving directions that the debt due from *H. Elton* on the said bonds should not be enforced, the testator continued: "And I release my said son, his executors and administrators, from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects, and all other moneys due from him to me; and I desire my executors to do and execute all acts and deeds (if any) which may be necessary or proper for confirming and effectuating such release."

The testator made a codicil to his will, dated the 26th of September, 1873, in which, after reciting that his son *Frederick* had improperly received and applied to his own use certain moneys or the proceeds of securities held by him, amounting to £7600 or thereabouts, the testator revoked certain of the bequests to his said son contained in his will, and, among others, of the bequest of all his interest as mortgagee in the leasehold messuage and premises in *Piccadilly*, which he directed should go into his residuary estate, and then proceeded as follows: "I direct that the several securities held by me in respect of the said sum of £7600 shall be delivered up to my said son, or if he shall pre-

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C. A. 1877 EVERETT v. EVERETT. Statement.

decease me, to his executors or administrators, to be cancelled, and I release him from all claims and demands in respect thereof, and also of all moneys advanced on mortgage of the premises in *Piccadilly*, and I desire my executors to do and execute all such acts and deeds (if any) which may be necessary or proper for confirming and effectuating such release in the manner provided for in the last sheet of my aforesaid will." And the testator in all other respects confirmed his said will.

The house in *Piccadilly* was originally the property of *Frederick Everett*, who had mortgaged it to his father to secure an advance by him before the date of the will; but before the date of the codicil the testator had purchased the equity of redemption of the house.

After the date of the codicil the testator made further advances to his son of £200 and £150, which were due at the time of the death of the testator.

The testator died in May, 1874. The present suit having been instituted for the administration of his estate, the question arose whether those subsequent advances were intended by the testator to be released.

The Vice-Chancellor held that the will must be taken for this purpose to speak from the date of its execution, and that the subsequent advances were not released.

Frederick Everett appealed from this decision.

Argument.

Karslake, Q.C., and *Whitaker*, for the Appellant:—

The 24th section of the *Wills Act* (1 Vict. c. 26) enacts that a will shall be construed as to the real and personal estate comprised in it as if it were executed immediately before the death of the testator, unless a contrary intention shall appear by the will. The debts of the testator formed part of his personal estate; therefore the only question is, whether any contrary intention appears by the will. No such expression of intention has been pointed out; on the contrary, the words of the will seem expressly to refer to future debts. For the words "the aforesaid moneys, goods, chattels, and effects" comprehend all debts then due, and the securities for them, whether specially mentioned or alluded to under the expression "various other sums of money" which the testator says he has advanced; and the further words by

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which the testator releases, "all other moneys due from him to me," have no meaning unless they include debts subsequently contracted: *Wagstaff* v. *Wagstaff* (1); *Castle* v. *Fox* (2); *Goodlad* v. *Burnett* (3); *Lady Langdale* v. *Briggs* (4).

[JAMES, L.J., referred to an unreported case of *York* v. *Brown*, in which the testator, *John Neal*, devised "all his messuages, farms, lands, and hereditaments situate in the parish of *Great Bowden*," and afterwards purchased other land in the same parish. By the decree in that suit, made on the 11th of June, 1844, it was declared that the after-purchased estate passed under the devise.]

Glasse, Q.C., and *Nalder*, for the executors:—

There is a clear indication in the will and codicils that the testator did not mean to release debts incurred after the date of his will. The testator had four children besides the children of a deceased son, and he carefully divided his estate between them, and in so doing took into account the sums then owed by his son *Frederick*. Can it be supposed that he intended to include all advances which he might afterwards make, to any amount, which might entirely disarrange the scheme of division? Moreover, we find that in the codicil, after his son had become indebted to him in a further sum, he especially releases him from it, and also released him from the mortgage debt on the house in *Piccadilly*, shewing that he did not understand that the general release in his will would be sufficient for this purpose. *Douglas* v. *Douglas* (5) is directly in point. Other authorities in our favour are *Smallman* v. *Goolden* (6); *Cole* v. *Scott* (7); *Bothamley* v. *Sherson* (8), and *Sidney* v. *Sidney* (9).

J. Pearson, Q.C., and *Hunter*, for the residuary legatees.

JAMES, L.J.:—

I regret that I cannot arrive at the same conclusion with the Vice-Chancellor in this case.

(1) Law Rep. 8 Eq. 229.
(2) Ibid. 11 Eq. 542.
(3) 1 K. & J. 341.
(4) 8 D. M. & G. 391.
(5) Kay, 400.
(6) 1 Cox, 329.
(7) 1 Mac. & G. 518.
(8) Law Rep. 20 Eq. 304.
(9) Law Rep. 17 Eq. 65.

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The words of the statute are quite plain: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will." Here the words of the will are: "I release my said son, his executors and administrators, from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects, and all other moneys due from him to me." There is no doubt that the testator's debts were part of his personal property comprised in the will, and the gift is generic; so that *primâ facie* the will operates from the testator's death. Therefore the only question is, What is there in the will to shew a contrary intention?

Now, it is said that a contrary intention may be shewn in the will by taking into consideration the surrounding circumstances. The testator had several children, and it is argued that he was distributing his property among them, that it must be presumed that in making this distribution he would have regard to the debts that were due to him from his son at the time, and that we cannot suppose that he would take into account what might become due to him afterwards, for that would entirely alter the distribution of the property. But to my mind that consideration is far too wide and remote a speculation, and would be merely a guess at the intention of the testator. With respect to the case of *Smallman* v. *Goolden* (1), in which Sir *Lloyd Kenyon* held that a gift to the testator's son of "all sums of money due to me from him on bond or any other security" must be confined to debts due at the date of the will, it must be remembered that the decision was before the *Wills Act*, and there was no distinct enactment, as there is now, that a will must be construed, as to the property comprised in it, as speaking from the death of the testator, unless a contrary intention appears by the will. In the present case, so far from there being any expression of a contrary intention, the words seem to me to indicate an intention to release future advances. The testator releases all claims in respect of the "aforesaid moneys," that is to say, the debts on bond and other securities which he specially mentions, and also the various other sums

(1) 1 Cox, 329.

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which he says he had advanced to his son, and as to which he says "he is now indebted to me in divers sums in respect thereof." Assuming that the word "now" in that clause must be limited to the date of the will, there is the further clause in the release, "and all moneys due from him to me." He does not say "now due," and that clause can have no meaning unless it can have the meaning which the Act gives it by making it speak from the death of the testator.

Then it is said that the codicil shews that this interpretation cannot be put on the will, because in the codicil the testator specially releases a certain debt subsequently contracted. But when we look at the codicil we see that this debt was not for money advanced by the testator, but for money improperly appropriated by the son, and he may well have thought that such a debt would not be included in the release contained in the will of moneys due to him, and therefore considered it right specially to mention it. The other matter referred to in the codicil is the mortgage on the house in *Piccadilly*, which had been given by the will, not to the son alone, but to his wife and children, and the testator, therefore, thought it necessary specially to notice that debt. On the whole, I feel bound to say that I cannot see any sufficient expression of intention to take the case out of the statute. The decision of the Vice-Chancellor must, therefore, be reversed.

COTTON, L.J.:— Cotton, L.J.

I also am unable to agree with the decision of the Vice-Chancellor. It is a pure question of construction. There is no doubt that a release of debts is a gift of personal estate within the meaning of the 24th section of the *Wills Act*. If so, the words releasing the debts are *primâ facie* quite sufficient under the statute to include all debts due at the death of the testator, and the only question is whether a contrary intention appears by the will. I think we ought not to fritter away the effect of the statute by catching at doubtful expressions for the purpose of taking the case out of the operation of the statute. Mr. *Glasse* contended that in construing the will you must look at the surrounding circumstances to ascertain the intention of the testator. I agree that you must know

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the subject-matter of the gift and the circumstances with which the testator is dealing; but it is said that you must also take into consideration that the testator was a father who was making his will and distributing his property among his children. By this argument, in effect, we are asked not to rely upon the language of the testator as supplying a dictionary or interpretation to his own meaning, but to introduce a presumption of what his meaning was likely to be. We are asked not to look in the will for the expression of a contrary intention, but to conjecture what the intention of a father distributing his property among his children ought to be.

Two other matters were referred to, namely, the release of the two debts in the codicil. But one of those debts was in respect of money improperly obtained by the son, and the testator may have well thought that the general release of debts in the will would be held to be confined to debts of a like nature to those before mentioned, and would not include a liability in respect of moneys improperly obtained; and as to the mortgage debt, the reference to it is explained by the special circumstances of that security, which might induce the testator specially to refer to it.

Thesiger, L.J. THESIGER, L.J.:—

I am of the same opinion. I will confine myself to a consideration of the words used in the will. The testator first recites the existence of certain mortgages and bonds and specified sums in respect of which money was due to him from his son; so far he is speaking only of what was due at the date of the will. Then he says that other sums were then due to him from his son, still speaking from the date of the will. Then we come to the bequeathing part, and it is argued that the bequest should not be carried further than the extent indicated by the recitals. No doubt that is an element of consideration, but at the same time we must give effect to all the words of the will, and also to the enactment of the statute. The testator says, "I give and bequeath to my said son *Frederick Everett* all and every the aforesaid several moneys, together with the several paintings, &c., now in my custody, possession, or power relating thereto." It is clear from these words that "the aforesaid several moneys" apply not

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only to the advances specifically mentioned, but to the other sums in respect of which the son is mentioned as "now indebted" to his father. This throws light on the subsequent words, "I release my said son from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects," that is, all the debts referred to in the recitals; and when he proceeds to say, "and all other moneys due from him to me," we should not be giving effect to the words if we were to read them as including only debts existing at the date of the will, and did not extend them to include debts which might afterwards become due.

Solicitors: *Collyer-Bristow, Withers, & Russell; H. R. Poole.*

SAUNDERS *v.* JONES.

[1877 S. 35.]

Practice—Discovery—Interrogatories—Particulars of Demand—Accounts—Rules of Court, 1875, *Order* XXXI., *rr.* 5, 8, 19.

The Defendant employed the Plaintiff as manager of his business under a written agreement at a salary and a commission on the gross amount of sales. Disputes having arisen, the Defendant summarily dismissed the Plaintiff. The Plaintiff commenced an action for wrongful dismissal. The Defendant by his defence alleged specific acts of misconduct against the Plaintiff, and also alleged in general terms other acts of misconduct justifying the dismissal. The Plaintiff exhibited four interrogatories, of which the substance was to ask the Defendant to specify the acts of misconduct on which he relied, and a fifth interrogatory asking for the total amount of the gross proceeds of sales during the period for which the Plaintiff claimed remuneration. The Defendant refused to answer the first four interrogatories, on the ground that they related to the case of the Defendant, not of the Plaintiff, and the fifth interrogatory, on the ground that, as the right to an account of commission was disputed, the Defendant was not bound to give such account at that stage of the action:—

Held, by *Bacon*, V.C., and by the Court of Appeal, that the interrogatories must be answered.

Per Baggallay, L.J.:—Whether a party can, under Order XXXI., rule 8, object by affidavit to answer an interrogatory on any ground for which it might have been struck out under rule 5, *quære*.

THE Defendant was a cabinet-maker and upholsterer, and the Plaintiff had from 1863 till September, 1876, been in his employ-

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ment as salesman and manager. In October, 1875, a written agreement was entered into for the Plaintiff to receive £3 10*s.* per week and a commission of 2½ per cent. on the gross returns of business. In September, 1876, a dispute arose whether this agreement, which was not very carefully worded, extended beyond the year 1875, and on the 23rd of September the Defendant gave the Plaintiff a written notice to leave on the 30th. The Plaintiff replied, denying the Defendant's right to terminate the engagement by a week's notice, and stating that the Plaintiff would treat it as a wrongful dismissal and seek his legal remedy. In January, 1877, the Plaintiff commenced his action, asking for an account of business done during 1875 and 1876, and payment of commission upon the gross returns, or for commission on the gross returns actually received, and damages, or for damages simply. The Defendant, by his statement of defence, insisted that on the true construction of the agreement commission was only payable for the year 1875, and stated that he had dismissed the Plaintiff for violent behaviour and abusive language such as could not be tolerated in a servant. He went on to allege as follows:—

"10. Soon after the Defendant had so dismissed the Plaintiff the Defendant was informed, and it is the fact, that the Plaintiff for some years past had been in the habit of requiring and receiving a commission, bonus, or payment from persons employed by and on behalf of the Defendant. Such commission, bonus, or payment has varied in amount, but in one case which has come to the Defendant's knowledge, that of a tradesman to whom he has paid thousands of pounds, it was at and after the rate of £2 10*s.* per cent. on the amount of the orders given on the Defendant's account, although in many instances these orders were given by the Defendant personally and irrespective and without the intervention of the Plaintiff.

"11. The said commissions, bonuses, or payments were demanded and taken by the Plaintiff without the sanction or knowledge of the Defendant, and, in fact, represented so much money taken from the Defendant and appropriated by the Plaintiff.

"12. Other instances of gross misconduct on the part of the Plaintiff, resulting in serious loss to the Defendant, have lately come to the latter's knowledge.

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"13. While a house belonging to the Defendant was undergoing repair, the Plaintiff took the opportunity of having a house of his own painted, and charged the whole time and materials employed thereon to the Defendant, who, in entire ignorance of the fraud practised upon him, has paid the whole amount.

"14. The Plaintiff by his negligence involved the Defendant in contracts necessarily involving losses, and in other instances acted in a negligent manner wholly opposed to the Defendant's interests."

The Defendant went on to allege in similar general terms the misconduct of the Plaintiff, by way of counter-claim, and claimed to have the agreement of October, 1875, set aside, to have an account taken of all sums received by the Plaintiff by way of commission, and the amount paid with interest, and if the Court should hold the Defendant not entitled to have the agreement cancelled, then, if necessary, to have it rectified by confining it to 1875, and in any event to recover damages for the Plaintiff's acts and omissions complained of.

The Plaintiff thereupon delivered the following interrogatories for the examination of the Defendant:—

"1. Let the Defendant set forth a full, true, and accurate account of all the instances in which he alleges that the Plaintiff has been in the habit of requiring and receiving a commission, bonus, or payment from persons employed by and on behalf of the Defendant, including the names, addresses, and descriptions of the persons by whom the Defendant alleges that such commissions, bonuses, or payments have been paid or made to the Plaintiff, the respective amounts of such alleged commissions, bonuses, or payments, the respective dates on which the Defendant alleges that such commissions, bonuses, or payments were so paid or made, the respective amounts of percentage alleged to be represented by such commissions, bonuses, or payments respectively, and the particular order or work in respect of which every such commission, bonus, or payment is alleged by the Defendant to have been so paid or made.

"2. Let the Defendant set forth full particulars of each and every of the other instances of gross misconduct on the part of the Plaintiff resulting in serious loss to the Defendant, which the

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Defendant by the 12th paragraph of his defence and counter-claim alleges to have lately come to the Defendant's knowledge, shewing also in each instance the amount of the loss which is alleged to have resulted to the Defendant, and how the Defendant makes out that such loss has in any way resulted from any conduct of the Plaintiff.

"3. Let the Defendant set forth to what house belonging to the Defendant, and also to what house belonging to the Plaintiff, the Defendant refers in the 13th paragraph of his said defence and counter-claim, and what was the amount which the Defendant in that paragraph alleges that he paid in entire ignorance of the fraud which he in that paragraph alleges was practised upon him by the Plaintiff, and when and to whom and by what mode of payment the Defendant paid such amount; and if the Defendant shall allege that such amount was part of a larger amount, then let him set forth when and to whom and by what mode of payment he paid such larger amount, and what the particular amount, part of such larger amount, it is which the Defendant alleges that he paid in such entire ignorance as aforesaid.

"4. Let the Defendant set forth a full, true, and particular account of every contract necessarily involving loss to which he refers in the 14th paragraph of his said defence and counter-claim, so as to shew the date, the parties to the subject-matter of, and the short material particulars, including the contract price of every such contract; and let him also set forth, in the case of every such contract, whether it was procured through the Plaintiff or through the Defendant, and how he makes out that it resulted in a loss, and what was in each instance the amount of such alleged loss, and also how in each instance he makes out that he was involved in the particular contract by the alleged negligence of the Plaintiff. Is it not the fact that immediately or very shortly before December, 1863, or when else, the Defendant had been bankrupt, or how otherwise? Was not the Defendant, during the period between December, 1863, and the date of the dismissal of the Plaintiff from the Defendant's employ, constantly, or on some and what occasions or occasion, in want of money, or how otherwise? Did not the Plaintiff, on several and what or some and what occasions or occasion, make some and what cash advances or cash advance to or for

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the Defendant, and whether or not at the Defendant's request, and whether or not to assist him, or how otherwise? Were not such advances all without interest, or what amount of interest, at what rate and on what advances or advance made to or for him by the Plaintiff does the Defendant allege that he ever paid to the Plaintiff, and when and by what mode of payment did he pay such interest? Is it not also the fact that on several and what or some and what occasions or occasion the weekly salary payable to the Plaintiff was, and whether or not owing to the Defendant's money difficulties, allowed by the Plaintiff, and whether or not at the request, and whether or not for the convenience of the Defendant, to be in arrear, or how otherwise; and whether or not on some occasions or occasion, and whether to an aggregate amount exceeding £50, or to some and what aggregate amount, or how otherwise? Is it not the fact that the Defendant, and whether or not owing to his money difficulties, has on several and what or some and what occasions or occasion made large and what or some and what deductions or deduction from contract prices or allowances or allowance in respect of contracts, or how otherwise? Are or is not all or some or one and which of the alleged losses complained of in the 14th paragraph of the said defence and counter-claim referable in fact, either wholly or in part, to such deductions or deduction, or allowances or allowance, or how does the Defendant make out the contrary?

"5. Let the Defendant set forth an account of the total aggregate amount of the accounts for the current year, commencing January 1st, 1875, and terminating on the 31st of December, 1875, which up to the date of his swearing to his answer in reply to these interrogatories shall have been rendered to the various customers of the Defendant, and also shewing the total aggregate amount which up to the same date shall have been received in respect of the accounts so rendered; and let the Defendant also set forth a similar account for the period commencing the 1st of January, 1876, and terminating on the 30th of September, 1876, and also a similar account for the period commencing the 1st of October, 1876, and terminating the 31st of December, 1876; and let him also set forth an account shewing the total aggregate amount of the accounts yet remaining to be rendered to the various customers

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of the Defendant for the year 1875, and for each of the two lastly mentioned periods."

Statement.

The Defendant, by his answer, gave the name of the tradesman referred to in paragraph 10 of the statement of defence, and declined to give any further answer to interrogatory 1, on the ground that it related to the case made by him against the Plaintiff, and did not advance the Plaintiff's case.

In answer to interrogatory 2, he stated that the other instances of gross misconduct referred to in paragraph 12 of the defence were instances of misconduct of a similar character to those the nature of which was stated in the defence, and he declined to answer further for the same reason as in case of interrogatory 1.

In answer to interrogatory 3, he specified the houses referred to in paragraph 13 of the defence, and declined to answer further for the same reason.

In answer to interrogatory 4, he denied that all or any of the losses complained of in paragraph 14 of the defence were referable either wholly or in part to any deductions or allowances made by him from contract prices, and declined to answer further, for the same reason as before, so far as related to the first part of the interrogatory down to the words "negligence of the Plaintiff," and as to the rest of the interrogatory, on the ground that it was irrelevant, and not put *bonâ fide* for the purpose of the action, and was unnecessary and useless.

As to the 5th interrogatory, he stated that he had produced his books to the Plaintiff, who had examined them, and he declined to answer the interrogatory, on the ground that as the right to an account was disputed, the Plaintiff was not entitled at this stage of the cause to have an account set out.

The case was heard before Vice-Chancellor *Bacon* on the 8th of November, 1877.

Argument.

Kay, Q.C., and *Bathurst*, for the Plaintiff:—

It is a settled rule that every one who answers must answer fully: *Elmer* v. *Creasy* (1); *Saull* v. *Browne* (2); and the Court may be trusted to exercise a proper control over any attempt on the Plaintiff's part to press for discovery which would be vexatious

(1) Law Rep. 9 Ch. 69. (2) Law Rep. 9 Ch. 364.

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or unreasonable: *Great Western Colliery Company* v. *Tucker* (1). Under the new practice, the right to discovery is regulated by the rules previously existing in equity: *Anderson* v. *Bank of British Columbia* (2). The 5th interrogatory is not oppressive, as the Plaintiff simply asks for such an account as may enable him to get a decree at the hearing, and the Defendant, though he seeks to set it aside, admits the agreement in respect of which the account is required.

Sir *H. Jackson*, Q.C., and *Crossley*, for the Defendant:—

By Rules of Court, 1875, Order XXXI., rule 19, when the right to discovery depends on the determination of the question in the cause, the Court may order such question to be determined first, and reserve the question as to discovery. In this case the question is really whether the Plaintiff, who is endavouring to get at the evidence which we shall use in support of our case at the trial, is entitled to see our brief. If these interrogatories as framed are answered by us, we shall be precluded from shewing at the hearing any other instances of the improper receipt of commission than those of which he has received notice from the answer.

[BACON, V.C.:—Why are you not at liberty to bring forward cases of which you have subsequently acquired the knowledge?]

When we have once given our particulars the rule at law is that we are limited to them and cannot bring forward any fresh instances: *Bolton* v. *Corporation of Liverpool* (3); *Ingilby* v. *Shafto* (4); *Combe* v. *Corporation of London* (5).

The Plaintiff is endeavouring to get at the evidence which we shall use at the hearing, but cannot compel discovery of matters which tend to support the case raised by our counter-claim, or relate exclusively to the evidence by which it is to be established, and do not in any way establish that set up by the Plaintiff: *Commissioners of Sewers* v. *Glasse* (6); *Clegg* v. *Edmondson* (7). The authorities at common law are to the same effect, and lay down that dis-

(1) Law Rep. 9 Ch. 376.
(2) 2 Ch. D. 644.
(3) 1 My. & K. 88.
(4) 33 Beav. 31.
(5) 1 Y. & C. Ch. 631.
(6) Law Rep. 15 Eq. 302.
(7) 22 Beav. 125.

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covery will be limited to such matters as relate to the Plaintiff's case and do not extend to a discovery of the manner in which the Defendant's case is to be established, or to evidence which relates exclusively to the case of the interrogated party: *Whateley* v. *Crowter* (1); *Edwards* v. *Wakefield* (2); and here also, if the discovery is such as may be used for purposes prejudicial to the Defendant, irrespective of the suit, the Court will look narrowly to the question whether it is really material to the interrogating party at the hearing: *Carver* v. *Pinto Leite* (3); *Moore* v. *Craven* (4).

The effect of the counter-claim is to make *Saunders* a Defendant and place *Jones* in the position of a Plaintiff; and as a Defendant *Saunders* has no right to see beforehand the evidence on which the Plaintiff rests his case.

We charge the Plaintiff with fraud when he was acting in our employ, but we are not bound to furnish him with the details and circumstances on which we rest our case.

As to the account required by the 5th interrogatory, so far as it extends to profits for the year 1876, we deny that that year was included in the agreement. Order XXXI., rule 19, applies strictly to such a case, and the Plaintiff before obtaining the accounts must first establish that he has any right as a partner during that period: *Lindley* on Partnership (5).

Kay, in reply:—

Having charged us with fraud, the Defendant is bound to give us the particulars of fraud. If this were an action at common law, the Defendant would be ordered to give particulars in writing of the acts of fraud relied upon: *Chitty, Archb.* (6); *Marshall* v. *Emperor Life Assurance Society* (7); and the practice is the same in equity: *Combe* v. *Corporation of London* (8); *Lowndes* v. *Davies* (9). If the Defendant had raised this case by cross-bill under the old practice, we could have demurred, but we cannot demur to a counter-claim.

(1) 5 E. & B. 709.
(2) 6 E. & B. 462.
(3) Law Rep. 7 Ch. 90.
(4) Ibid. 94, n.
(5) Page 1020.
(6) 12th Ed. p. 1464.
(7) Law Rep. 1 Q. B. 35.
(8) 1 Y. & C. Ch. 631.
(9) 6 Sim. 468.

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BACON, V.C.:—

The principle involved in this discussion is one of great importance. The right of a Plaintiff in Equity to discovery, in my opinion, has undergone no change from the earliest time from which the procedure of this Court can be traced. The rule quoted by Lord *Cottenham* (in *Attorney-General* v. *Corporation of London* (1)) from *Mitford* on Pleading (2) is as much the rule at this day as it ever was, and I think the Plaintiff is entitled to the discovery from the Defendant of all that the Defendant relies on to rebut the Plaintiff's claim. The change in the mode of procedure by introducing counter-claim instead of cross-bill, is an alteration, but the principle is not in the slightest degree altered. A case in which a man claims to have certain rights under an agreement is met by a Defendant who says that the agreement is invalid, or at least, that he is not bound by it for certain reasons. But then he must state those reasons. It is not enough for him to say, as this Defendant does, in his answer, that commissions were received, and that they were received without his sanction or knowledge, without saying what the commission was. The receipt of commission under the circumstances stated by the Defendant may or may not be an answer to the whole or some part of the Plaintiff's claim. The only question I have to consider is, whether, according to the rules of discovery, according to the practice of this Court, the Plaintiff has a right to say to the Defendant, who has now become Plaintiff, If you rely upon these acts of misconduct, tell me what they were. For what purpose? Not to better his own case. Not, as in some of the cases referred to, seeking to ransack the depositories of a Defendant of his title deeds or other documents, in order that the Plaintiff may establish more firmly the case he alleges, or make it out entirely. It is not for that purpose at all. It is to ascertain what he has to meet; and if the practice had never been varied, if there was no counter-claim, but the Plaintiff seeking the relief which he states upon the bill had been aware of what the Defendant relies upon and had framed his bill, after the statement of his own claim in that old-fashioned mode that draughtsmen used to indulge in—"The Defendant resists the claim upon divers pretences, and he pretends"

2 Mac. & G. 247, 253. (2) 4th Ed. p. 9.

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so and so; and then if he had quoted those very words about the receipt of commission and the other acts of gross misconduct, and so on, and had proceeded: "But the Defendant will not tell me what are the instances, and I who have him here in Court for that purpose require him to tell me what commission I received, and when and from whom, and what other acts of gross misconduct I have committed"—he might, in the most ordinary course of bill and answer, have compelled an answer to such interrogatories. Is the principle varied by anything that has taken place since? The Defendant, by filing his counter-claim, became Plaintiff in a cross suit. The Defendant in this cross suit, who is called upon to answer the substantive allegations contained in the counter-claim, desires to know what he is to answer. What can he answer about? The counter-claim referred to acts of gross misconduct. How can he tell what will be brought against him at the hearing? If he had the names of the persons who are said to have paid him commission, a variety of circumstances might be adduced—do not suppose I am saying they can be in this case—but he might have proved that the particular commission alleged against him was paid by the man who paid it with the knowledge and sanction or at the request of the Defendant himself. He might have an answer in that way, or he might have the means of shewing that no such sums ever were paid to him. But with this vague statement, more vague than in any case I have heard referred to, he is called on to proceed to the hearing with the allegations against him that he has committed fraud by receiving commissions, or he has committed other acts of misconduct, and has deceived and cheated his master in other ways, and the master will not tell him when or where or under what circumstances. Discovery would be an empty word if the person so assailed had not the right to require of the Defendant what it was he meant to allege against him. In the common law case that was referred to, the charge of fraud was not held to be sufficient. The notorious practice that the Defendant has a right to require particulars of demand, is only an instance of the principle of discovery as it exists in common law, it being in its essence the same principle as that which has prevailed in the Court of Equity.

The cases referred to do not in the least justify the argument which has been addressed to me, that this is an attempt by the

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Plaintiff in this suit to get at the Defendant's brief. It is nothing of the sort. He does not ask to know the name of any single witness. He does not introduce any fact, but he takes up the facts which the Defendant alleges in his counter-claim, and says, "Tell me what you mean by it, let me understand what it is we are fighting about."

The case of *Whateley* v. *Crowter* (1) which was referred to was an attempt to get some plans which had been made during a litigation. It decides itself; it is only necessary to read it. The Defendant in a suit had been doing his best to defend himself, and he had made some plans. The Plaintiff says, "Let me look at the plans?" What right had he to look at the plans? The other case referred to, *Edwards* v. *Wakefield* (2), is equally plain when it is considered. Assignees in bankruptcy bring an action against a man who has had bills of exchange, or some other transaction with the bankrupt. The general allegation was (as it must have been) that those transactions were subsequent to the date of the act of bankruptcy committed by the bankrupt. Then the Defendant tries to know by what means the Plaintiff will prove his case. What had the Plaintiff to prove but the proceedings in bankruptcy, that the adjudication was valid because an act of bankruptcy had been committed? He could not take a step without that. What did it concern the Defendant? What right had the Defendant to extract that from him? The Plaintiff had to make out a legal title before the Defendant was called upon to answer him, and the Defendant was not entitled in the meantime to look into and ransack the proceedings in the bankruptcy for the purpose of defeating the action. There was no reason, considering the ends of justice, why he should be permitted to do any such thing.

Now in this case nobody will dispute that the principle is that the Defendant, or the Plaintiff in this case, by interrogatories or answer, is entitled to the discovery which is necessary to enable the Court to do justice between the parties. It would be a most inconvenient mode of pleading in this case if the Defendant were at liberty at the hearing to put into the box parties whom the Plaintiff never heard of, whose names and residence were wholly unknown to him, to depose to transactions which in themselves might be wholly untrue, which the Plaintiff could have no means

(1) 5 E. & B. 709. (2) 6 E. & B. 462.

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of detecting or denying in Court. On the other hand, if the Defendant will tell him what he means by the other acts of gross misconduct, what is the meaning of the charge that he has received from various persons commissions, then he knows what he is about, and he comes into Court at the hearing with the means of meeting the case or not as it may be.

I think the interrogatories are in their scope too wide. It is not necessary for me to alter them now, because if the Defendant states fairly and fully in his answer what acts of receipt of commission by the Plaintiff he relies upon, or what other acts of misconduct have been committed, it will satisfy the ends of justice and give the Plaintiff all the information it is requisite for him to have when the case comes to a hearing.

With respect to the account for the year 1875, I have not heard a shadow of a reason why that should not be furnished. He is not asked to furnish any more particular account than the names and amounts of money that he has received, and upon which the Plaintiff is entitled to commission.

The Defendant begins by admitting the agreement. There is no doubt about the agreement, one of the stipulations of which is that the Plaintiff shall have this allowance upon the sums received, and all he asks is to know what sums in that year 1875 (of which I speak alone at this moment) were received. The answer to that in one state of circumstances will entitle the Plaintiff to ask for the payment into Court at least, if not payment to him, of the whole of that sum which may be acknowledged to have been received; that surely is a right of which the Plaintiff ought not to be deprived. On the other hand he may see he has been under a mistake, or that the thing is not worth prosecuting, or for various other reasons when the case comes to a hearing he may say it is not worth a straw.

In my opinion the Defendant must answer, and answer properly.

If he puts in a further answer to the effect that the interrogatories are too extensive, that may be easily dealt with at another time, but that the Plaintiff is entitled to discovery I entertain no doubt.

C. A. From this decision the Defendant appealed. The appeal was heard on the 20th of December.

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Sir *H. Jackson*, Q.C., and *Crossley*, for the Appellant:—

We contend that the first four interrogatories ought not to be allowed: a party is not entitled to see his adversary's brief.

[THESIGER, L.J.:—A servant brings an action for wrongful dismissal, the master pleads misconduct justifying the dismissal: is not the Plaintiff entitled to have the particulars of the alleged misconduct set out that he may know what case he has to meet?

JAMES, L.J.:—It is to be supposed that the Defendant does not make an allegation of this kind at random, but has particular instances in view. Ought not the Plaintiff to know them?]

Under the old practice in Chancery, if a Defendant pleaded a ground of defence generally, could the bill have been amended to make him set it out more particularly?

[JAMES, L.J.:—I should say that it belonged to the elements of pleading to do so.

THESIGER, L.J.:—At common law, where there was a general charge of this nature, the opposite party had clearly a right to be furnished with particulars.]

A party could not ask in equity for a discovery of what supported his adversary's case: *Commissioners of Sewers* v. *Glasse* (1).

[JAMES, L.J.:—In that case a discovery of the evidence of the opposite party was asked for.]

Edwards v. *Wakefield* (2) is very like this case, and the difference between a discovery on oath and the giving particulars not on oath was pointed out. We should not object to the latter. A party is not obliged to answer as to what relates only to his own case: *Wigram* on Discovery (3); *Day's* Common Law Procedure Act (4). A party has a right to discovery only of what assists him, not what assists the other side: *Ingilby* v. *Shafto* (5). The 5th interrogatory involves a different question. It is to be decided at the trial whether commission was payable, and until that has been decided we ought not to be compelled to set out an account of commission: *Wigram* on Discovery (6); *Moore* v.

(1) Law Rep. 15 Eq. 302.
(2) 6 E. & B. 462.
(3) 2nd Ed. p. 261.
(4) 4th Ed. p. 305.
(5) 33 Beav. 31.
(6) 2nd Ed. p. 224.

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Craven (1); Order XXXI., r. 19; *Great Western Colliery Company* v. *Tucker* (2). An oppressive account like this will not be ordered before trial, where the right to any account is disputed and the Defendant is ready to produce his books: *Lockett* v. *Lockett* (3).

[BAGGALLAY, L.J.:—Ought you not to have applied to strike out the interrogatories under Order XXXI., rule 8, and not having done so, are you not bound to answer them?]

We submit that we may avail ourselves either of rule 5 or rule 8.

Kay, Q.C., and *Bathurst*, for the Plaintiff, were only called upon as to the 5th interrogatory:—

If we had asked for a detailed account there would have been force in the Defendant's argument, but the Plaintiff only asks for gross totals, which can be set out in two or three lines, and with very little trouble. It is material to the Plaintiff to have this information, since then, if he obtains a decision in his favour at the trial, he can accept the account as given by the Defendant, and obtain an immediate order for payment.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

In this case I am of opinion that the Vice-Chancellor's order must be affirmed. The whole of the elaborate, ingenious, and learned argument of the Appellant is based on the narrowest and most technical ground. It is admitted that the Plaintiff would be entitled to have this information given by way of particulars at common law. I do not mean that he would be entitled to have every detail that is asked for—that will have to be considered when the answer is put in—but at common law, if a master says to his servant "I dismissed you because you were guilty of misconduct," the servant would be entitled to have particulars. When, therefore, an interrogatory has been delivered asking for particulars of misconduct, that interrogatory not being objected to, and no application having been made to strike it out, I can see no reason why an answer should not be given saying

(1) Law Rep. 7 Ch. 94, n. (2) Law Rep. 9 Ch. 376.
(3) Law Rep. 4 Ch. 336.

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what the particulars are on which the master relies as being the ground of dismissal. The Plaintiff requires the information in order that he may not be taken by surprise, but may know what case he has to meet. He is entitled to particulars like the particulars of breaches or infringement, and it is no sufficient answer to say, "You have not taken the right course, you ought to have applied to the Vice-Chancellor for particulars," which is not according to the practice of the Chancery Division. The only mode in which those particulars could have been got in Chancery was by administering interrogatories, and I am of opinion that a party may still adopt that course, and that the interrogatories must be answered.

Judgment, C. A. James, L.J.

With regard to the last interrogatory, the only thing asked for is the aggregate amount on which the commission is due. If the Plaintiff succeeds in his contention that he is entitled to a fixed commission upon the amount, his having that amount admitted would enable him at the trial, without any further inquiry or litigation, to obtain a decree for the payment of that which is due to him. It would be impossible to differ from the Vice-Chancellor in holding this is not one of those cases in which it is oppressive or hard, or might lead to great inconvenience, for a party to be called on to give an account.

BAGGALLAY, L.J. :—

Baggallay, L.J.

I am of the same opinion. The Plaintiff in this case was the manager or foreman to the Defendant in the business of upholsterer and house decorator. He brings an action for the purpose of recovering arrears alleged to be due to him in respect of his services, which arrears were in part composed of a commission for work done by him for his master. That is met by an allegation that he conducted himself in a variety of ways so improperly in the course of his service that the master was entitled to put an end to the agreement altogether, and dismiss him.

In that view of the case nothing would appear to be more reasonable than that, in order to let the party bring his case properly into Court, he should know the cases of misconduct alleged against him. It is suggested there is some technical rule which precludes this. I must confess that I am not struck by any of the

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instances brought forward, and, having regard to the very general terms of the several rules which together make up the 31st Order, it appears to me that this is a discovery to which the Plaintiff is entitled.

Judgment, C. A. Baggallay, L.J.

I desire also to say that I entertain some doubt whether the Appellant is not now coming too late with his appeal, having regard to the stringent terms of Order XXXI., rule 5, the object of which was to require that in cases where an objection is raised to interrogatories that objection should be taken at the earliest possible period, four days only being allowed for the purpose; whereas, if the objection is taken by the answer to the interrogatories, a much longer time is given. I can hardly imagine that the Legislature, in adopting this rule which required the objection to be taken in a limited period, should by a subsequent rule extend that period and leave it to the option of the party to select which he chooses. However, it is not necessary to decide that question on the present occasion. If we were now disposing of an application to strike out these interrogatories, I am of opinion that such application ought to be refused.

Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. This action is in substance the old common law action for wrongful dismissal. In it the Defendant has pleaded certain specific instances of misconduct, which he says justified him in dismissing the Plaintiff. In addition to those specific instances, he has pleaded in the most general terms in the 12th paragraph of his statement of defence that there were other instances of general misconduct on the part of the Plaintiff which had resulted in serious loss to the Defendant, and which had lately come to the latter's knowledge, and in the 14th paragraph of his statement of defence, also in the most general terms, he states that the Plaintiff by his negligence had involved the Defendant in contracts necessarily involving loss, and in other instances had acted in a negligent manner wholly opposed to the Defendant's interests.

This being substantially the old common law action for wrongful dismissal, the practice in the Common Law Courts prior to the Judicature Acts seems to be of some materiality.

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Now, the practice under which discovery in an action of this kind, and similar actions, was obtained, was of a threefold character. In the first place, discovery might be obtained of any documents which were material to the matter in dispute between the parties. In the second place, in an action where general allegations were made in the pleadings, either by the Plaintiff or by the Defendant, either party could obtain particulars, the object of which was to limit the generality of those pleadings and enable the other party to know accurately what was the case to be brought against him. Thirdly, the ordinary machinery of interrogatories, which, as counsel have correctly stated, were interrogatories limited to the case which the particular party administering the interrogatories intended to set up, and were not allowed to be administered when they went to a discovery of the case of the party proposed to be interrogated.

In early days there was an attempt made on the part of the Judges to keep the separate parts of the machinery distinct, and to have separate proceedings for the obtaining of discovery of documents, particulars, and interrogatories. But in process of time it was found to be more convenient and less expensive to amalgamate in some measure the different parts of the machinery, and it was the constant practice (I can speak from my own experience, and I see I am borne out by Mr. *Day* in his book, to which reference has been made) to introduce the ordinary application for discovery of documents among the interrogatories that were administered, and latterly I can say the practice crept in of asking by interrogatory as to the specific acts which were intended to form the issue to be tried between the parties.

That being the state of the practice at common law, let us see what has been endeavoured to be done in this case.

It seems to me, when we look at the first four of the interrogatories, that they practically amount only to asking the Defendant to give a list of the acts on which he relies as justifying the dismissal of the Plaintiff. Is not the Plaintiff entitled to have that? The case of *Commissioners of Sewers* v. *Glasse* (1), cited by Sir *Henry Jackson*, is, I think, very clearly distinguishable. There the Plaintiff had set up a particular right. Part of his evidence

(1) Law Rep. 15 Eq. 302.

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to establish that right would be to shew that the right had been actually enjoyed, and the Defendant asked to be allowed to interrogate him as to specific instances in which that right had been exercised or enjoyed. Lord *Romilly* decided that that could not be done, for this obvious reason—the acts themselves were not at issue, but were only evidence bearing on the issues which were raised between the parties. But in this case, where the Defendant has pleaded in most general terms acts of misconduct, he might set up any particular act of misconduct as one of the issues in the action. If that be so, the Plaintiff is entitled to know what that specific issue is, and the interrogatories to which I refer amount to no more than asking the Defendant to give such particulars as will enable the Plaintiff to see what are the issues with which he has to deal.

Sir *Henry Jackson* urges that there is an objection to that being done, because it is practically making the Defendant swear to the truth of the allegations in his pleadings. I differ from that view. What the Defendant is asked to do in these interrogatories is, not to swear that the acts which he may allege have been in fact committed, but to say that they are the acts on which he proposes to rely in support of his defence; and if subsequently it is discovered by the Defendant that there are other acts on which he may fairly and reasonably rely, there is nothing to prevent his being allowed to amend his answers to the interrogatories, just as he might have amended his particulars under the old practice before the Judicature Acts, and set up other acts of misconduct which he might allege entitled him to rescind the agreement.

The only remaining question is as to the 5th interrogatory. It seems to me most reasonable that the Plaintiff should be allowed to put that interrogatory. If it had been a common law action he would undoubtedly have been entitled to put the question contained in that interrogatory, because in such an action he would have been bound to prove his whole case, and part of the case being that he was entitled to a commission on all moneys received in particular years, he would have had to prove what those moneys were, and such an interrogatory, as an interrogatory directed to shewing what the amount received was, would be allowed as a matter of course. If a detailed account had been asked for, there

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might have been a question whether it ought not to be postponed until after the hearing of the action; but here the Plaintiff reasonably says: "If I get an admission of the aggregate amount of the moneys which have been received, and shew that the agreement ought not to have been put an end to, I can get complete relief at the hearing of the action, and shall not require the expensive machinery of an account in Chambers to ascertain what is due.

For these reasons, it seems to me that the learned Vice-Chancellor has exercised his discretion rightly, and that the appeal should be disallowed.

Solicitors: *H. S. Harris & Godwin; Risley & Stoker.*

ALLEN *v.* BEWSEY.

C. A. 1877 V.-C. H. *May* 5, 7. C. A. *Dec.* 5, 19.

[1875 A. 57.]

Copyhold—Tenure for Life with Power to nominate Successor—Devise of Legal Estate to Trustees—Equitable Limitations of Inheritance.

By the custom of the manors of *Y.*, *P.*, and *S.*, the tenant of a copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees to the use of his grandson *A.* for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of *A.* and their heirs as tenants in common, with remainder to the use of the Plaintiffs. By a codicil the testator, after reciting that he had ascertained that his "said copyhold estates" were held of the manors of *P.* and *S.*, directed that "all his said copyhold estates within the manor of *P.* and *S.*" should be held by his said trustees to the uses and upon the trusts in his said will declared, if and so far as the customs of the said respective manors would warrant or authorize; and if the custom of the said manors or either of them did not warrant or authorize the entail created by his said will, then and in that case his said grandson *A.* and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the said manors. *A.* was admitted tenant for his life, and nominated the Defendant as his successor, who was admitted accordingly. On a bill filed by the Plaintiffs to carry into effect the trusts of his will:—

Held, first, that the trustees took the legal estate in the copyholds held of

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the manor of *Y.*, and ought to have been admitted instead of *A.*, and that all the beneficial limitations in the will were equitable interests. Secondly, that the codicil had no reference to the copyholds held of the manor of *Y.*; and that even if it did refer to them, it did not revoke the equitable limitations of the will. Thirdly, that although by the custom of the manor the tenements were only held for life with power of nominating a successor, the testator had power to dispose of the equitable inheritance by giving successive equitable interests.

The decision of *Hall*, V.C., affirmed.

Statement.

SOLOMON SLY was the owner of certain copyhold lands which he had purchased of Mr. *E. Henning* and of other persons, which were held of the several manors of *Yetminster*, *Yetminster Prima*, alias *Upbury Prebend*, and *Yetminster Secunda*, alias *Netherbury Inferior*, in the county of *Dorset*.

By his will, dated the 22nd of February, 1837, and attested by three witnesses, he gave all his copyhold and customary lands and hereditaments "within the manor and parish of *Leigh*" which he had purchased of Mr. *E. Henning* and others to *W. Eliot*, *J. Bower*, and *J. Richards*, and their heirs, to the uses and upon the trusts following (that was to say), to the use of his grandson *Samuel Wallis Allen* for life, with remainder to the use of the trustees and their heirs during his life to preserve the contingent remainders, with remainder to the use of all and every the children or only child of the body of *Samuel Wallis Allen* as tenants in common, and their, his, or her respective heirs and assigns, with remainder to the use of his grandson *Solomon Wall Sly Allen* for life, with remainder to the use of the trustees and their heirs during his life to preserve the contingent remainders, with remainder to the use of all and every the children or only child of the body of *Solomon Wall Sly Allen* as tenants in common, and their, his, or her heirs and assigns, with remainder to the use of his grandson *James Allen* for life, with divers remainders over, and with an ultimate remainder to the use of the testator's right heirs.

There was no parish or manor of *Leigh*, but there was a tithing or vill of *Leigh*, in the county of *Dorset*, within which all the testator's copyholds held of the manor of *Yetminster* were held.

According to the custom of the manors of *Yetminster*, *Yetminster Prima*, and *Yetminster Secunda*, a customary tenant is entitled to hold his tenement for life only, but such tenant is entitled to nomi-

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nate, by a writing attested by two witnesses, one or more persons to be his successor or successors in the tenancy after his death, whom the lord is bound to admit. If more than one person is nominated, the persons so nominated are entitled to be admitted concurrently during their lives or the life of the longest liver of them, with the right in such longest liver to nominate a successor or successors to himself. The nomination may be either by will or codicil or by a separate instrument; but where it is by will, it is usually, but not always, so stated in the Court Rolls.

On the 4th of March, 1837, the testator made a codicil to his will, and thereby, after reciting that since the making of his will he had ascertained that his estate at *Leigh* purchased of Mr. *Henning* was of freehold and not of copyhold tenure, declared as follows: "that my said freehold estate shall be holden by my said trustees to the uses and upon the trusts and for the intents and purposes declared in my said will concerning my said estate at *Leigh* aforesaid." And after reciting that it had been also discovered that his said customary or copyhold estates at *Leigh* were within the manors of *Yetminster Prima* and *Yetminster Secunda*, the testator proceeded: "Now I hereby will and direct that all my said copyhold or customary estates within the said manors of *Yetminster Prima* and *Yetminster Secunda* respectively shall be holden by my said trustees, their heirs and assigns, to the uses, upon the trusts, and to the ends, intents, and purposes in my said will expressed and declared, if and so far as the customs of the said respective manors do or will warrant or authorize. And I further will and declare, that if the customs of the said manors or the custom of either of them do not or does not warrant or authorize the entail in and by my said will created or limited, then and in that case my said grandson *Samuel Wallis Allen* and his assigns, or his nominee or nominees or successor or successors, shall have and hold my said copyhold or customary estates and hereditaments according to the custom of the said manors respectively. In all other respects I confirm my said will."

The testator died on the 20th of March, 1837. He never made any nomination of a successor to his copyhold tenements held of the manor of *Yetminster* other than by his said will and codicil. The copyholds in the manor of *Yetminster* were the only lands

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which were the subject of this suit, no relief being sought as to tenements held of the manors of *Yetminster Prima* and *Yetminster Secunda*.

Statement.

Samuel Wallis Allen took the name of *Sly* in addition to his other names, in pursuance of a provision contained in the will. He claimed to be admitted tenant of the copyhold tenements within the manor of *Yetminster* held by his grandfather, and was admitted accordingly. It was not stated on the Court Rolls whether his nomination was by will or by a separate writing. None of the trustees made any claim for admission.

Samuel Wallis Allen Sly died without issue on the 22nd of June, 1874, having by his will devised his lands within the manor of *Yetminster* to the Defendant *Elizabeth Mary Bewsey* for her separate use, and by a separate instrument of the same date he nominated her as his successor in all the said copyhold lands. She was accordingly admitted tenant on the 24th of April, 1875.

Solomon Wall Sly Allen, the next equitable tenant for life under the limitations in the will of *Solomon Sly*, died in November, 1856, and the present suit was instituted by his children against *Elizabeth Mary Bewsey* and *W. Eliot*, who was the surviving trustee of the will, praying that *Elizabeth Mary Bewsey* might be declared a trustee for the Plaintiffs of the said copyhold tenements in the manor of *Yetminster*, to which she had been admitted tenant.

The cause came on for hearing before Vice-Chancellor *Hall* on the 5th of May, 1877.

Argument.

Joshua Williams, Q.C., and *C. Browne*, for the Plaintiffs, contended, on the construction of the will and codicil of *Solomon Sly*, that the legal estate in the copyholds held of the manor of *Yetminster* was given to the three trustees, who ought to have been admitted tenants as trustees for the persons entitled as beneficiaries under the will. Although the copyholds were only held for life, with a power of nominating a successor, the beneficial interest could be limited to successive owners, the tenant for life for the time being being bound to exercise his power of nomination in accordance with the limitations in the will. They referred to *Doe* v. *Llewellin* (1); *Doe* v. *Thompson* (2); *Rawe* v. *Chichester* (3).

(1) 2 C. M. & R. 503. (2) 7 Q. B. 897.
(3) 2 Amb. 715.

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Dickinson, Q.C., and *Yate Lee*, for the Defendant *E. M. Bewsey*, contended that whether the legal estate in the copyholds was given to the beneficial owner or not, the custom of the manor prevented any greater interest than a life estate being given, and that the first devisee took only as the successor nominated by the testator, and all the limitations in the will by way of remainder were void. Under these circumstances they relied on the last clause in the codicil as giving an absolute right to *Samuel Wallis Allen* to nominate a successor himself independently of the will: *Pullen* v. *Middleton* (1); *Preston* on Conveyancing (2); *Lewin* on Trusts (3).

Heath, for the Defendant *Eliot*.

Joshua Williams, in reply.

Judgment, V.-C. H.

HALL, V.C., after reading the devise of the copyholds in the will, continued:—

It appears to me that the effect of the will was to create only in the property in question equitable estates so far as the beneficiaries are concerned, and to give the legal estate to the trustees; and I say that, after having considered the authorities on the subject, including one before the present Master of the Rolls, *Baker* v. *White* (4), in which case *Doe* v. *Barthrop* (5) and *Houston* v. *Hughes* (6) were commented on. *Doe* v. *Barthrop*, which perhaps is in some respects at variance with *Houston* v. *Hughes*, decided that although the property is copyhold, the mere fact of devising it to trustees does not vest the legal estate in the trustees if in a subsequent part of the will you have got words of gift, and not merely a trust created of the property, as where there is a devise of copyholds to trustees "to the use of my son for life," and the testator proceeds, "and from and after his decease I give and devise my copyholds to *A*." In that case there is nothing to prevent the legal fee passing by the second devise. Now, applying that to the case before us, we have no words of further devise, and the only question is whether, from the insertion of the estate

(1) 9 Mod. 483.
(2) Page 153.
(3) 6th Ed. p. 42.
(4) Law Rep. 20 Eq. 166.
(5) 5 Taunt. 382.
(6) 6 B. & C. 403.

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to preserve contingent remainders, I can, upon some ground of general intention, hold that the trustees take in the first instance no estate at all, and that the first beneficial use was executed by analogy to the *Statute of Uses*, and then that the trustees take estates for life to preserve contingent remainders. But there is no authority which warrants such a construction; there being in fact no analogy to the *Statute of Uses*, as there has been held to be in the case of freeholds. That was the ground of the decision in *Baker* v. *White* (1), and I think that is the case which should govern the present. We, therefore, have this state of things, that what was given was only a nomination for the life or lives of the trustees named in the devise, namely, *Eliot*, *Bower*, and *Richards*; and it therefore seems to me that what was done, subject to any question which may arise on the codicil, was a mistake, and that the three trustees ought to have been admitted. Two of them are now dead, and *Eliot* is in fact the person who, according to the custom of the manor, if what was right had been done, would be now the tenant, and would hold for the remainder of his life. The parties claiming under the beneficial dispositions have only, as I have said, an equitable interest. But it appears to me that the rightful owner, whoever he may be, has a right to say that in equity at this moment the property must be taken to be impressed with a trust in his favour, the legal title being considered to be for this purpose in *Eliot*, who is one of the Defendants.

[With respect to the construction of the codicils, his Lordship was of opinion that the declaration as to the freehold estate referred only to freeholds, and did not affect any of the copyholds. He also held that the codicil left the devise to the trustees of the lands held of the manor of *Yetminster* unaffected; and that, assuming that the direction in the last clause of the codicil referring to lands held of *Yetminster Prima* and *Yetminster Secunda* had any reference at all to the lands held of *Yetminster*, it did not interfere with the equitable dispositions contained in the will respecting those lands. On this subject his Lordship said:—]

I consider that it was not intended by that codicil to make any new disposition of the copyhold property, or any part of the copyhold property, provided always that his intent and meaning as

(1) Law Rep. 20 Eq. 166.

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contained in his will could have legal effect given to it. By legal effect I mean not merely as a legal disposition of a legal title, but that it would have the effect it was meant to have according to law. I consider it must be taken to have valid effect and operation given to it as being a disposition of this property in favour of the beneficiares, although only giving them equitable estates. The testator may well have supposed that no equitable disposition could be made, by reason of his estate being only a life estate, or that there might be difficulties as to the admission of the three trustees, having regard to the custom of the manor. But the truth is, that there was no difficulty as to the admission of three trustees; they might have been admitted, and if that had been done *Eliot* would have been the present tenant as the legal owner for life.

That being so, I am clearly of opinion that the right of nomination of a successor would belong to the persons entitled under the beneficial dispositions in the will. This is my view of the construction of the will and the codicil, without entering at all into the second question, which might arise if this had been a legal disposition as distinct from an equitable disposition. Putting aside the codicil for the moment, I should then certainly consider, and should be prepared to hold, that if a tenant for life were the first beneficiary and legal owner under the will, and he were admitted as the person nominated by the testator, he must take so as to give effect to the limitations expressed in the will, they being quite possible to be carried into effect through the medium of the nomination of that tenant for life; and I should certainly hold that the tenant for life must be considered in the nature of a trustee, and as accepting the benefits given to him by the will upon the terms of exercising his right of nomination for the benefit of the persons who were to take after him.

That is, of course, irrespective of the question whether, according to the true construction of the codicil, it was intended that, if it could not be done otherwise, *Samuel Wallis Allen* should take absolutely. As regards that, if that question had arisen and was to be disposed of, I should still have a very strong opinion (although I do not mean to decide the question) that it was not intended by that clause in the codicil to alter the bene-

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ficial interest created by the will, seeing that by that very codicil he deals with the freehold part, or what he says is ascertained to be the freehold part, and keeps up the scheme of the will. It seems to me to have been only a piece of machinery employed by the testator for the purpose of effectuating his intention, and was not meant to alter the beneficial interest in any way.

Taking this view of the case, I must declare that the Plaintiffs have, from the time of the death of *Samuel Wallis Allen Sly*, been beneficially interested in the property in question, and that *E. M. Bewsey*, having been in possession since his death, is accountable to them for the rents and profits.

C. A.

From this decision the Defendant *Elizabeth May Bewsey* appealed. The appeal came on to be heard on the 5th of December, 1877.

Argument.

Dickinson, Q.C., and *Yate Lee*, for the Appellant:—

All the copyhold property was meant to be included in the last clause of the codicil: and the effect of that clause is that the testator has declared that if the limitations in the will are contrary to the custom of the respective manors, the copyholds are to belong to his grandson, *C. Wallis Allen*, absolutely. This turns out to be the case, for the copyholds are only lifehold with power of nominating a successor. The testator could not therefore settle them beyond one life. It is said that these limitations are equitable only, but the equitable interest in copyholds cannot be larger than the legal interest: *Watkins* on Copyholds (1); *Pullen* v. *Middleton* (2). By the custom of the manor of *Yetminster* the tenant can only appoint a successor, he cannot dictate to the successor whom he is to appoint to succeed him. In the present case there is no evidence that the steward saw the will or codicil at all. The probability is that the testator made an independent nomination of his grandson by a separate instrument.

Joshua Williams, Q.C., and *C. Browne*, for the Plaintiffs, were not called on.

(1) 4th Ed. p. 218 (Coventry's Note). (2) 9 Mod. 483.

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JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Hall*, in which in substance he declared the Plaintiff entitled to some copyhold lands held of the manor of *Yetminster*, in the county of *Dorset*. A great many points have been argued before us, and I propose to notice almost all of them.

The will dealt with copyhold estates held of several manors. There was the manor of *Yetminster*, of which the lands in question are held, the manors of *Yetminster Prima*, alias *Upbury Prebend*, and *Yetminster Secunda*, alias *Netherbury Inferior*. In all these manors the custom is one which I believe is not uncommon in the west of *England*. The copyhold tenant held during life, with power to nominate a successor. He might nominate one person, and that one person was admitted, or he might nominate several, and then they were admitted as joint tenants, and the lord of course took a larger fine. But that only dealt with the legal ownership. There was nothing in those manors, nor in any other manors with which I am acquainted, which prevented the beneficial owner dealing with the beneficial interest, whether he was one of the lives nominated or not, and the lives nominated in succession for centuries might be trustees. And as far as I am aware there is no pretence for saying that in a Court of Equity the equitable interests in the copyholds so held could not be dealt with according to the same principles on which equity deals with other estates *pur autre vie*, as they would in the case I have put of trustees being nominated.

Now, this testator happened himself to be a nominee or tenant for life of the copyholds, and he was the beneficial owner, and he gave by his will all his copyhold lands situate and lying within the manor and parish of *Leigh*, in the county of *Dorset*, which he purchased of Mr. *Edmund Henning* and others, to three trustees (naming them) upon trust, or to the use of a grandson, *Samuel Wallis Allen*, for life, and with remainder to the children of *Samuel Wallis Allen*, their heirs and assigns, and in default of such issue then to another grandson, *Solomon Wall Sly Allen*, and then to his children, and in default over. The grandson *Samuel Wallis Allen* has died without ever having a child. The grandson *Samuel Wall Sly Allen* has died having had many children, of

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whom the Plaintiffs are three. The other children died in his lifetime. He was their heir at common law, and he having died intestate, the Plaintiffs, the remaining children, claim the whole, partly in their own right as three of the children of *Solomon Wall Sly Allen*, and partly as regards one of the Plaintiffs, as the heir-at-law of his father, who was heir-at-law of the other children.

The gift in the first place by the will certainly comprised the copyholds in question. There was no manor or parish of *Leigh*, but there was a district of *Leigh*, which was either a tithing or a vill, it does not matter which, and therefore you must read this as if he said all my copyhold lands within the tithing or vill of *Leigh*, in the county of *Dorset*, as you have nothing else to which the description can apply. They are all within the tithing or vill, and therefore would all have passed, and the greater part of the copyholds in question were purchased of Mr. *Edmund Henning*, but not all of them, and all the copyholds the subject of the suit are within the manor of *Yetminster*.

Then, by a codicil he states this: "Whereas since the making of my said will it has been ascertained that my estate at *Leigh*, in the county of *Dorset*, mentioned in my aforesaid will to have been purchased of Mr. *Edmund Henning*, is of freehold tenure, and not copyhold or customary land as designated in my said will, now I hereby will and declare that my said freehold estate shall be holden by my said trustees, their heirs and assigns, to the uses, upon the trusts, and for the ends, intents, and purposes expressed and declared in my said will of and concerning my said estate at *Leigh* aforesaid." And then, after reciting that it had also been discovered that his said copyhold or customary estates at *Leigh* aforesaid were within the manors of *Yetminster Prima* and *Yetminster Secunda*, he proceeds: "Now I hereby will and direct that all my said copyhold or customary estates within the said manors of *Yetminster Prima* and *Yetminster Secunda* respectively shall be holden by my said trustees, their heirs and assigns, to the uses, upon the trusts, and for the ends, intents, and purposes in my said will expressed or declared, if and so far as the customs of the said respective manors do or will warrant or authorize. And I hereby further will and declare that if the custom of the said manors or the customs of either of them do not or does not warrant

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or authorize the entail in or by my said will created or limited" (the word "entail" being used inaccurately for the succession or settlement made by the will), "then and in that case my said grandson *Samuel Wallis Allen* and his assigns, or his nominee or nominees or successor or successors, shall have and hold my said copyhold or customary estates and hereditaments according to the custom of the said manors respectively. In all other respects I confirm my said will."

After his death, it appears that *Samuel Wallis Allen* presented some nomination or other in writing as to the manor of *Yetminster*, and was admitted tenant for his life. He afterwards, by will, nominated Mrs. *Bewsey*, and at his decease she was admitted, and is a Defendant in this suit. The custom allows the nomination to be made either by a testamentary instrument or by any other writing. There is no direct evidence as to what the nomination in writing was that was produced by *Samuel Wallis Allen* when he was admitted, but the will and the codicil were proved, and there is no suggestion that I can find worthy of attention of the existence of any other writing. All that can be said is this, that as regards the other two manors of *Yetminster Prima* and *Yetminster Secunda*, it is said that in addition to the codicil there were nominations in writing of even date which were presented. But that does not appear to me to carry the case further, for the nominations in writing of even date could not by themselves have given the grandson a beneficial interest. They would be only ancillary to the purposes of the codicil, whatever those purposes might be; and it does not appear to me therefore that it at all varies the matter; that is my opinion, though I am not bound to decide that point, because it does not appear to me that the nomination by independent writing is in any way proved or ought to be inferred by the Court in this case. I think the only nomination in writing was by the codicil. But, as I said before, I am satisfied that were it otherwise proved, although it is not necessary to decide the point, my opinion would not be affected by the production of an independent nomination, for I do not consider a document of even date to be one which would in any way affect the true construction of the codicil as disposing of the beneficial interest.

Now, that being so, the first question we were asked to consider

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was this, whether or not the codicil revoked the gift in the will so far as regards the lands in the manor of *Yetminster*. Now, I think you must distinguish those lands into two portions. You must first deal with the lands purchased of *Henning*, and then with the remainder of the lands. As regards the lands purchased of *Henning*, I do not think it is fairly open to argument that the codicil revoked the devise by the will. The devise was of the copyholds. The codicil merely says he has discovered they are freeholds, and they are to go in the same way. It seems to me impossible to say that that is anything more than a confirmation —whether my lands are copyhold or whether they are freehold as regards those I purchased of *Henning*, they are to go as directed by my will. But my opinion goes further. I think if there had been no will, and you had to depend on the codicil alone, this gift of lands, purchased of *Henning*, by the codicil would have passed the copyhold lands purchased of *Henning*, because he states that he has ascertained that "my estate at *Leigh*, purchased of *Henning*, is freehold, and I give the said freehold estate "—that is, the freehold estate at *Leigh* purchased of *Henning*. The word "freehold," being a mere error of description, is sufficiently corrected by the context, and would have passed the copyhold estate. Therefore, in my opinion, not only is the will not revoked, but if the sole testamentary instrument had been the codicil, those estates would have passed.

He then goes on to say: "Whereas since the execution of my said will it has been also discovered that my said copyhold or customary estates at *Leigh* aforesaid are within the manor of *Yetminster Prima* and *Yetminster Secunda*." It is impossible, it appears to me, to contend with success that "the said copyhold estates" can refer to anything else than the estates he did not purchase of *Henning*. He has dealt with all he bought of *Henning*, and therefore whatever they refer to they must refer to the others. It is a recital that those copyhold or customary estates at *Leigh*, other than those bought of *Henning*, are within the manor of *Yetminster Prima* and *Yetminster Secunda*. That has been the discovery. Then he says: "Now I hereby will and direct that all my said copyhold or customary estates within the said manors of *Yetminster Prima* and *Yetminster Secunda* shall be

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held" in a certain way. What passed under that gift? I am clearly of opinion that it passed the lands in *Yetminster Prima* and *Yetminster Secunda*, and that no lands in *Yetminster* were affected by it. First of all, it is quite true that the recital is "that my said copyholds are within the manors." But he has not given "my said copyholds." In the other case he did give "my said freehold estate." But he is not giving "my said copyholds," but only "my said copyholds lying within the manors." And there is a reason for this. He does not intend to deal with any other copyholds. If there has been any mistake as to his copyholds lying within the manors in question, the will does exactly what he intends. He only intends to effect a devise of lands within the particular manors, as to the customs of which he has heard something. And therefore, whether you look at the motive or whether you look at the actual words of the devise, there seems to me no reason for extending the words beyond their literal meaning. The lands within those manors are the lands he intends to deal with, although he believes that that includes all his copyhold lands. But it is for those who say you are not to read the words literally to shew a contrary context. To my mind, so far from the context assisting them, it damages their case, because the object of the testator was clearly only to deal with lands which were subject to the special and peculiar customs of those two before-mentioned manors. In my opinion, therefore, nothing whatever in the manor of *Yetminster* passes by that codicil, and if that is so, the will remains unaffected, and the lands will pass by the will.

But there is another reason, and I will consider that, on the assumption that the codicil had dealt specifically with lands in the manor of *Yetminster*. The testator's words are, "If the customs of the said manors, or either of them, do not or does not warrant the entail," something is to happen. This clause, again, confirms the view I have taken, that the lands in *Yetminster* did not pass, for it would be very absurd to revoke the devise of lands in *Yetminster* because the lands in *Yetminster Prima* or *Yetminster Secunda* could not be devised according to the custom when lands in *Yetminster* could by the custom of that manor. Then it goes on to say, "do not or does not warrant the entail in or by my said will created or limited." As I said before, that is

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a mistake. There was no entail in the strict sense of the term, and you must read "entail" to mean "settlement." Was there anything in the customs of the manors which prevented it? I am not aware of anything. The custom of the manor did not authorize a strict entail, but that is not what the testator says. He says "the entail in my said will created or limited," using, as I think he used, the term "entail" inaccurately. You must read it "the settlement by my will made." I have not heard anything about the custom at all which affects that disposition. There is no doubt that the custom did not authorize several gifts in succession at law, but that did not interfere with the equitable dispositions of the will, and it is the equitable dispositions which we are dealing with. The custom authorizes the settlement made by his will, for it authorizes the nomination of three trustees; it neither authorizes nor prohibits the equitable settlement, if I may so call it, created by the will after the nomination by the trustees. It is quite true that if there had been no custom authorizing an entail, then, according to the settled law, you could not have created a legal entail in the legal interests. And if it had been what it was described to be, an entail, then, if the custom did not allow an entail, the custom would not have allowed of the creation of such an equitable interest. But, in fact, there was nothing at all to prevent the creation of the equitable interest by the custom, and therefore there is not, in my opinion, a revocation of the interest created by the will. In that event he gave it to the grandson, but in other respects confirms his will. That is, he shews throughout this manifest intention, as it appears to me. "My will is to stand, if it can stand consistently with the customs of the manors. If there is an impossibility for my intention, as expressed in my will, to be carried out by reason of those customs prohibiting it, then I give to my eldest son, but otherwise my will is to stand." And so reading it, I think even this clause does not assist the Appellant.

The last argument which I think it necessary to notice was put on the will itself. It was said that, inasmuch as by the custom of the manor it was impossible to have a customary heir, the Plaintiffs could not succeed, at all events so far as the derivative title was concerned. It would then stand in this way: a nomination of

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three trustees who would take as legal owners, and they would have to hold the property in trust for *Solomon Wall Sly Allen* for life, and then for his children as tenants in common. And it was said that the trust for the children might be good, but the trust for the children and his or her heirs and assigns would not be good, and that the heir—that is, the common law heir, for it could have no other meaning, there being no such thing as customary heir—would not take. No authority was cited for this proposition, and I think I may say none could have been cited, because I am sure the industry of the counsel for the Appellants would have discovered it if it existed. It is against all the law on the subject with which I am acquainted. You may appoint what is called a special occupant of an estate *pur autre vie;* and if you designate the heir—that is, the common law heir—he takes under that designation. If, therefore, the Plaintiffs had not been, as they are, three of the children (and they would certainly be entitled to recover in that character, even according to the argument of the Appellant), still the heir of the child or children who has or have died would be entitled to take as being a person designated under the description in the trust designated, not because he is heir, but because he answers the description of the person to whom the trust estate is given. As I said before, there is not only no law against it, but all the authorities on the subject are for it. And any other construction would lead to this, that the trustee having got possession of the estate, would hold it for his own benefit, notwithstanding the will of the testator which directed him to hold it in trust for the person designated there. I think that argument is not supported on principle any more than it is on authority, and that it ought not to prevail. For these reasons I agree with the decision at which the Vice-Chancellor has arrived, and I think the appeal ought to be dismissed.

Judgment, C. A. Jessel, M.R.

BAGGALLAY, L.J.:—

Baggallay, L.J.

There are two questions involved in this appeal; the one as to the proper construction of the will and codicil of the testator, the other what ought to be the effect of the construction so properly put upon it.

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Now, it appears to be clear, from the introductory words of the will, as they are set out in the bill, that it was the testator's intention to dispose of all his copyhold or customary estates lying within the district of *Leigh*, whatever that district might be, and which had been the subject of purchase by him from Mr. *Henning* and other persons, although no doubt there is an error in speaking of those lands as his copyhold or customary estates within the manor and parish of *Leigh*, there being no such manor or parish; they were within a district commonly known as *Leigh*, and which was technically termed the tithing or vill of *Leigh*. I think, therefore, that all the copyhold or customary estates of the testator, including those which form the subject of the present inquiry, passed under the terms of the will itself.

Then we come to the codicil, and I think it is abundantly clear from the recitals which the testator introduced into his codicil that the object of the codicil was to correct two mistakes which he had made, or thought he had made, in describing his property. I think the expression used by the Master of the Rolls is a very apt one; his object was confirmation, and not revocation. He first of all deals with the property which he had bought of Mr. *Henning*, which he says he has since ascertained was of freehold tenure, and not of copyhold or customary tenure as designated in his will; and then he proceeds: "I hereby will and declare that my said freehold estate shall be holden by my said trustees, their heirs and assigns, to the uses, upon the trusts, and for the ends, intents, and purposes expressed and declared in my said will of and concerning my said estate at *Leigh* aforesaid." Finding a portion of the property devised by his will, viz., that purchased from Mr. *Henning*, to be freehold instead of copyhold, he confirms the provision he had made by the will with reference to that particular property, and it appears to me clear that, as far as regards any portion of the property which had passed or would have passed by the will under the description "of all his copyhold or customary estates," the will still remained in force, and that it so remained in force in respect of any portion of the property which the testator had purchased from Mr. *Henning*, and which was really of copyhold tenure, as he originally thought, and was not of the freehold tenure as he thought he had subsequently discovered.

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Then with regard to the second mistake which he thinks he has discovered. He thinks that he has discovered that his copyhold property is lying within two particular manors, and he goes on to direct that his copyhold estates within those two manors shall go upon the same trusts and for the same purposes as were in his will mentioned. There again it was evidently his intention to confirm the provisions of his will, notwithstanding the mistake he supposed he had made in his will. It seems to me that cannot possibly pass any customary estate which the testator had in the third manor, the manor of *Yetminster*. It was sufficient to pass, and was intended to pass, those which were within the two manors of *Yetminster Prima* and *Yetminster Secunda*, but was not sufficient to pass those which were held of the manor of *Yetminster*, and all those, including those which are the subject of the present inquiry, must have passed under the will.

In this view of the case it becomes unnecessary to consider the the further provisions at the end of the codicil, which were to take effect if the customs of the said manors—that is, of *Yetminster Prima* and *Yetminster Secunda*—would not authorize the settlement which he had intended to make by his will.

I have nothing whatever to add to what the Master of the Rolls has said upon the assumption that the *Yetminster* property passed by the codicil, because it seems to me clear that even upon that assumption it would not be included in the final gift.

We have, then, the disposition of the copyhold property which forms the subject of the present suit depending simply on what we find in the will; it is unnecessary for me to read through those limitations again, they have been so often referred to, and are, I think, happily described by the Master of the Rolls as a settlement—I think settlement describes them better than anything else—an equitable settlement of the property of which no doubt there must be a tenant from time to time on the Court Rolls, which tenant, after obtaining his position as such by virtue of the provisions of the will, could only remain as tenant on the terms of giving effect to the equitable interests created by the testator's will. In that way there was originally the grandson, *Samuel Wallis Allen*, who was placed upon the Court Rolls in the first instance; he was the person who had the beneficial interest for his

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Judgment, C. A. Baggallay, L.J.

life, and he was therefore *quasi* trustee, and at the same time the person entitled to enjoy the rents and profits; he had also, as incidental to the fact of his being actual tenant on the Court Rolls, the right of nominating a successor, but he was only in a position to nominate a successor by reason of his being tenant on the Rolls by virtue of the provisions contained in the will, and therefore he was bound to exercise that nomination in a way to give effect to the equitable interest created by the will. He by his will, and by a certain document which was contemporary with his will, appointed the present Defendant, Mrs. *Bewsey*, to be the tenant upon the Court Rolls as his nominee, and, if I am right in what I have said just now, that he could only exercise that power of nomination in order to give effect to the equitable interest created by the will, the person who was so nominated would, upon her becoming admitted as tenant on the Court Rolls, be equally bound to give effect to the trust of the will. It appears to me, therefore, that the decree of the Vice-Chancellor was perfectly correct in that respect.

Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. In the first place it seems to me clear that by the will were devised all the copyhold or customary estates of the testator lying and being within the tithing or vill of *Leigh*, those estates being described as having been purchased of Mr. *Edmund Henning* and other persons. That, therefore, by itself would have carried all the customary estates within the three manors, *Yetminster*, *Yetminster Prima*, and *Yetminster Secunda*, and the devise was of all the copyhold estates within those three manors upon certain trusts which I need not mention.

That being the state of the will, it appears that the testator made two discoveries. The first of those discoveries was, that as regards the purchase from Mr. *Edmund Henning*, at least a portion of the land purchased was freehold, and not copyhold. In point of fact the discovery as regards the testator was inaccurate, because he was clearly under the impression that the whole of the property purchased from Mr. *Edmund Henning* was freehold. The other matter upon which the testator seems to have made some discovery, or rather entertained some doubt, was this, as

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to whether, under the custom of these manors or certain of these manors, he was able to carry out the devise which he had previously made; and here I think I ought to say that I go to a certain extent with the argument which has been addressed to us on the part of the Appellants, because, inasmuch as we find that the customs of the three manors I have mentioned are similar or nearly identical, *à priori* one would reason that the intention of the testator in the codicil was this, first to provide that the freeholds should go according to the devise in the will, and secondly, that the copyholds, whether they were in one manor or in all the manors, should also go according to the devise in the will, unless those customs prevented it, in which case he proposed to deal with the whole of his customary estates by additional provision in the codicil.

So far I go with the argument on the part of the Appellants, but, at the same time, while it may be perfectly true that reasoning *à priori* one would imagine the intention of the testator was to deal with the whole of his copyholds, we must look to the words of the codicil to see whether that intention has been carried out. It seems to me clear, when we look at that codicil, that it has not been.

The first matter with which he deals is "my estate at *Leigh*, purchased of Mr. *Edmund Henning*." There is no limitation as regards those words. The words are general, and would by their natural force and signification carry the whole of the estate which he had purchased from Mr. *Edmund Henning*. Then he goes on inaccurately to say that that estate so purchased of Mr. *Edmund Henning* is of freehold tenure, and having made that inaccurate statement proceeds: "I hereby will and declare that my said freehold estate shall be holden by my said trustees, their heirs and assigns, to the uses," and so forth, declared in the will. It has been argued before us that inasmuch as the word "freehold" is introduced there, you must read the word as if the preceding clause had not referred to the whole of the estate purchased from Mr. *Edmund Henning*, but had only included that portion of the estate which was of freehold tenure.

Now, in the first place, I agree with what the Master of the Rolls has said, that if we read the codicil without the will, the

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words "my estate at *Leigh*, purchased of Mr. *Edmund Henning*," would carry the whole of the estate whether freehold or copyhold, although the testator has stated that the estate was of freehold tenure. But, assuming that not to be the case, then it seems to me clear, stopping on this part of the codicil, that the codicil containing only a provision for that portion of the estate purchased from Mr. *Henning* which is of freehold tenure, and there being no revocation of the will which deals with the copyhold portion of the estate purchased from *Henning*, it would come under the will unless there are words in the subsequent part of the codicil which shew distinctly a different intention.

When we come to the recital contained in the subsequent part of the codicil, there appears again an erroneous idea on the part of the testator as to which of his estates were customary or within what particular manors they were situated, and if I could have found in the remainder of the codicil any clear intention that he proposed to deal with the whole of the copyholds, then I think we might disregard this portion of the codicil where he erroneously describes his copyholds to be within the manors of *Yetminster Prima* and *Yetminster Secunda*. But the devising words are too clear to admit of any doubt on the matter, or to admit of any other than their literal and ordinary and natural signification. He devises copyhold lands within two manors, and within two manors only. Consequently all the copyhold lands within the third manor are either dealt with by the devise in the early part of the codicil, or we are thrown back to the will, and the devises under the will; and inasmuch as the grandson was let into possession, under this will and codicil, of the copyhold estates in the manor of *Yetminster*, he must be held to have been in possession subject to the trusts of the will, and having devised the estates, the devisee also would hold as a trustee for the purpose of that same will. I am of opinion, therefore, that the judgment of the Vice-Chancellor was correct.

Solicitors: *Pattison, Wigg, & Co.*, agents for *Andrews, Barrett, & Andrews, Weymouth; Lovell, Son, & Pitfield*, agents for *C. H. Baskett, Evershot.*

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DAVY *v.* GARRETT.

[1877 D. 167.]

C. A.
1877
V.-C. H.
Dec. 6.
C. A.
1878
Jan. 11, 12.

Practice—Rules of Court, 1875, *Order* XXVII., *r.* 1; *Order* XIX., *rr.* 2, 4, 24, 25, 27 *—Prolixity—Pleading calculated to embarrass opposite Party—Pleading Evidence—Allegation of Fraud.*

Although the Court of Appeal will not readily interfere with the discretion of the Court of first instance in a matter of procedure, it is its duty to exercise its own discretion as to whether a pleading is so framed as to embarrass the opposite party. In a case, therefore, where a statement of claim was in the opinion of the Court of Appeal calculated to embarrass the Defendants by reason of its stating immaterial facts, and setting out at great length documents which could not be material except as evidence by way of admission, it was ordered to be struck out, though a motion for that purpose had been dismissed with costs by the Court below.

The rule that evidence is not to be pleaded applies to admissions as well as to other evidence.

Statement.

THIS was an application by the Defendant *Parry* that the statement of claim might be struck out or amended so as not to embarrass the Defendant.

The action was by *Davy Brothers*, on behalf of themselves and all other the unsatisfied creditors of *Froom & Co.*, against *Garrett*, *New*, and *Parry*, and the allegations in the statement of claim were to the following effect:—

1. *Froom* for many years carried on an extensive business in *Russia* as an engineer under the style of *Froom & Co.* 2. Towards the end of 1875 *Froom* was in difficulties, and resolved under the advice of his legal adviser, Mr. *Lischine*, to resort to administration or liquidation according to Russian law. 3. In December, 1875, he sent a circular letter to his creditors, including the Plaintiffs. (This letter was set out verbatim.) 4. In the meantime proceedings for administration had been taken in the Commercial Court of *St. Petersburg*, and on the 23rd of December, 1875 (old style), the following balance-sheet was presented, and on the 30th of December, 1875 (old style), administration was granted. (The balance-sheet was set out verbatim.) 5. That it would be seen from the balance-sheet that the debts to English creditors amounted to £45,770; those to Russian creditors hardly to one-

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fourth of that sum. 6. That the credit side of the balance-sheet shewed a statement of assets, and a deficiency of somewhat more than £2200. 7. On the 8th of January, 1876, *Froom* wrote a letter to *Baines*, an English creditor, which was set out verbatim, containing a statement of the debtor's affairs, and stating the advice given him by *Lischine*. 8. A similar letter was sent to others of *Froom's* creditors. 9. *Lischine* continued to be *Froom's* adviser in respect of the moneys mentioned in the claim. 10. On the 31st of December, 1875 (old style), a meeting of creditors was held at *St. Petersburg*, at which resolutions were passed appointing *Linde*, *Friewirth*, and *Lischine* administrators, and conferring upon them certain powers for winding up the estate. (These resolutions were set out verbatim.) 11. The Plaintiffs were creditors for £265 and had received nothing. 12. In reply to an application for information made by *Turton & Co.*, who were creditors, *Froom* wrote to them a letter on the 26th of January, 1876, stating that there would be a meeting next day in *London* called by the Defendant *New*; that *New* had been at *St. Petersburg*, knew *Froom's* business, and was willing to aid to establish it properly, for that he knew it to be a good business, and its difficulties temporary. (This letter was set out verbatim.) 13. That on the 28th of January *Turton & Co.* received from *Froom's London* office a memorandum (set out verbatim) giving notice of a meeting of creditors in *London* on the 4th of February. That with such circular was inclosed a power of attorney to *Lischine* to act for the creditors. That a copy of the same power of attorney was sent to most or all of the English creditors, but none returned it executed. 14. About the same time several English creditors, among whom were the Defendants, took steps for getting the English creditors to act in concert; and on the 27th of January a circular was issued making proposals to this end, on the footing of buying out the Russian creditors, and carrying on the business. Those creditors who were not willing to subscribe to carry it on were to receive 7*s.* 6*d.* in the pound. This circular, which was set out verbatim, was signed by the Defendants and two other creditors. 15. *Garrett* and *New* were chiefly responsible for the circular, and took the most active part in the matter. 16. It was contemplated from the first that there should be two classes of English creditors: the one prefer-

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ring to accept a composition, the other electing to wait and aid the business with funds; and the trustees to be appointed were to be trustees for both classes. 17. This paragraph gave an account of the meeting on the 4th of February, stating that *Garrett* and *New* were present, but not saying whether the Plaintiffs were there or not; and that some creditors were willing to subscribe funds to buy out the Russian creditors and carry on the business till the subscribing creditors were paid in full. The majority would not subscribe, but were willing to accept a composition of 7*s.* 6*d.* in the pound. At this meeting *Garrett* and *New* and *Parry* were unanimously chosen trustees to represent all the English creditors; and certain resolutions were drawn up and signed by twelve creditors, by which the signatories agreed to provide *pro ratâ* sums to an amount not exceeding £10,000 to enable the trustees to settle the Russian liabilities, and pay the 7*s.* 6*d.* composition. 18. *Garrett & New* assumed the power of letting other creditors come in to sign, and the names were given of six creditors who thus came in. 19. The subsequent proceedings at the meeting were not intended to vary the resolution that the trustees should represent all the English creditors, and the Defendants accepted the trusteeship as trustees for all. 20. A few days later a circular letter with a copy of the above resolutions "was sent out to some of the creditors." (This letter was set out with a form of memorandum authorizing the Defendants to act for the creditor signing it.) 21. The Plaintiffs did not sign the memorandum, nor did the general body of creditors do so. 22. Soon after the meeting *New* and *Parry* went to *St. Petersburg* and assumed to act as representing all the English creditors. 23 set out in full a letter of the 26th of February, 1876, from a person writing on behalf of *Froom* to the Plaintiffs stating that a committee of three trustees from the largest of the English creditors was endeavouring to arrange *Froom's* debts in *England*, and named the Defendants as being such trustees. 24. The Plaintiffs thereupon wrote to *Garrett*, and received an answer, dated the 10th of March, 1876, which was set out, giving the impression that there would be hardly anything for the English creditors. 25. A report by the trustees addressed to the subscribers to the trust fund, but communicated to "all or many" of the other

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creditors, was set out at length, adverting to the possibility of the estate being sold to them by the administrators. 26. Letter from *Turton & Co.*, non-syndicate creditors, to *Garrett*, his answer, and *Turton & Co.'s* reply, set out at length. 27 stated that a meeting of syndicate creditors was held on the 2nd of June, 1876, and set out a circular letter sent by the trustees to the creditors, which stated the resolutions there passed, the principal one being that the trustees were requested to arrange terms with the non-assenting creditors, namely, to ascertain which of them would join the syndicate in raising the £6000 now required, and which of them would accept a dividend of not more than 5*s.* in the pound payable by bills extending over twelve months. A long letter from *Lischine*, which was referred to in the report, was also set out at length, and the letter concluded by suggesting that the creditors who had not joined the syndicate should hold a meeting and determine as to joining the syndicate or accepting a dividend. 28. That *Lischine* had throughout been employed by the Defendants as their legal adviser in respect of *Froom's* affairs, and gave them full information as to the requirement of Russian law as to proving debts and otherwise, and that the Defendants were well aware of the necessity for carrying in the claims of creditors, and of the times when such claims should be carried in, but that they nevertheless made no communication to any creditor on the subject. 29. Letter by Plaintiffs to *Garrett* on the 19th of June, 1876, asking for a statement of *Froom's* affairs, and reply of *Garrett* on the 22nd, stating that he was not able to send any reliable statement, both set out at length. 30 alleged that the Defendants, being such trustees as aforesaid, never gave the non-syndicate creditors any warning that in the event of their debts not having been proved in *Russia* before the close of the administration they would be altogether excluded. That the Defendants were aware of the result of neglect to prove, but that the other creditors were ignorant of it, and mostly allowed the time to slip by, relying upon the Defendants, as trustees, to look after their interests. The administration was formally closed in July, 1876, after which no debts could be proved. 31. That *Garrett* and *New* spent a long time in *St. Petersburg* about *Froom's* affairs, and intermeddled with his assets under the representation that they

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were acting for the general body of English creditors, but during their stay in *St. Petersburg* they conceived a plan for getting rid of a great part of the English creditors, and obtaining entire control of the business for their own personal benefit, and that the business was now carried on as a partnership, of which *Froom*, *Garrett*, and *New*, and *Law* were the members. 32. *Garrett & New* allege that they found it impossible, according to Russian law, to get the official administration wound up unless a new firm was established to take over the business. They were much influenced by the desire to prop up the business in order to keep open the market for the goods manufactured by themselves in *England*. In proof of this a portion of a letter from *New* was set out verbatim. 33. The course of the Defendants in reference to the claim of the Russian creditors was to buy up each creditor on the best terms they could. The money for the purpose was borrowed from *Gurney's* bank upon a deposit of the notes given by the syndicate creditors, which were never presented for payment, and were ultimately returned. 34 contained a general allegation of proceedings in *Russia* by *Garrett & New* which had caused dissatisfaction among the syndicate creditors, and as an instance stated at some length how *New* had contrived to buy part of *Froom's* estate for his own benefit. 35. Letter of the 1st of September, 1876, from *Garrett* to *Turton & Co.*, intimating that if they have not proved their claim in *Russia* it had become void. 36. *Turton & Co.'s* letter in reply expressing surprise, as they had relied on the Defendants to protect their interests, and angry answer by *Garrett*, and rejoinder by *Turton & Co.*, set out. 37. Letter of the 13th of September, 1876, from *Garrett* to *Baines*, a syndicate creditor, as to calling a meeting of the syndicate, set out at length. 38. A report of the trustees to the syndicate, with a balance-sheet, set out at length. 39 set out at length eight letters which passed on the subject in September, 1876, four of which were written by *Baines* to *New*, three by *New* to *Baines*, and one by *Garrett* to *Baines*. 40 contained extracts from a letter by *New* to *Baines*. 41. A long letter by the Plaintiffs to *Garrett* in October, 1876. 42. That a meeting of the syndicate creditors was held on the 25th of October, 1876, at which a resolution was passed accepting an offer of *Garrett & New* to purchase all

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the claims of the syndicate creditors for 15s. in the pound payable by instalments. (This resolution was fully set out.) 43. A release executed by the syndicate creditors in pursuance of the resolution was set out at length with more than a printed page of recitals, from which it appeared, among other things, that *Garrett & New* had purchased the whole of *Froom's* estate from the administrators. 44. That various other letters had been written by the Defendants, or some or one of them, admitting that they had interfered in the administration as trustees for the general body of English creditors. That the Defendants accepted their appointment as trustees of the general body of English creditors under the resolutions of the 4th of February, 1876, and represented themselves in *Russia* and elsewhere to be such trustees, and led the body of non-syndicate creditors to believe that the Defendants were protecting the interests of such general creditors. 45. That the Defendants had by the ways and means aforesaid and otherwise admitted their liability to account to the non-syndicate creditors, but now refused to render any account or pay any dividend to them. That the Defendants asserted that *Garrett & New* had acquired a right to hold the business and assets of *Froom & Co.* as purchasers discharged from any claims of non-syndicate creditors, whereas the Plaintiffs contended that the Defendants were bound to account as trustees for all assets of *Froom & Co.*, and their dealings therewith, and apply the same as trustees for the benefit of the non-syndicate creditors. 46. That the conduct of the Defendants, or some of them, in the matter of the Russian administration, prevented proper notices being sent to the English creditors to prove their debts, and such notices were not received or sent, and that the Defendants in fact undertook the duty of protecting such non-syndicate creditors. 47. That the Defendants assumed to interfere with authority in the Russian liquidation as representing all the English creditors, and intermeddled with the Russian assets, and the management thereof, as trustees, long before the purchase thereof by the new firm. 48. That the Defendants had received assets of *Froom & Co.* sufficient to pay the non-syndicate creditors 7*s.* 6*d.* in the pound, but repudiated all liability to pay them any dividend. That *Garrett & New* ought to account for all beneficial interests which they had personally gained by purchasing *Froom*.

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& Co.'s business. 49. That the foreign creditors of *Froom & Co.* had been satisfied.

The claim asked (1) for an account of the dealings and transactions of the Defendants relating to the Russian liquidation of *Froom & Co.;* (2) to have *Garrett & New* declared liable to account for all profits and benefits obtained by them as purchasers of the goodwill and assets of *Froom & Co.*, or any part thereof, (3) for payment of such dividends to the unsatisfied creditors of *Froom & Co.*, within the jurisdiction as might be just.

Statement.

Parry moved that the statement of claim might be struck out as embarrassing, and an abuse of the practice of the Court, or that the Plaintiffs might be ordered to amend the same by striking out the matters therein contained which might tend to prejudice, embarrass, or delay the fair trial of the action, or were merely evidence of the facts on which the Plaintiffs relied.

The motion was heard before Vice-Chancellor *Hall* on the 6th of December, 1877.

Argument.

Hastings, Q.C., and *Crossley*, for the Defendant *Parry*:—

This statement of claim is a clear violation of the rules as to pleading under the Judicature Acts. It offends rule 4 of Order XIX., which requires that every pleading shall contain, as concisely as may be, a statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved; and it also offends rules 24 and 27 of the same Order, which lay down that wherever the contents of any document are material, it shall be sufficient to state the effect thereof as briefly as possible, without setting out the whole or any part unless the precise words are material, and that letters, conversations, and circumstances raising implications as to contracts or relations between the parties are to be referred to generally, and not set out in detail.

Here there are set out about thirty letters, some of which are not addressed to any party to the action; numerous extracts from accounts and resolutions; and a deed of release. Moreover, while the action is brought on behalf of a non-syndicate creditor, more than half the statement of claim is taken up with statements about the syndicate creditors. The Defendant *Parry* has nothing

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whatever to do with many of the transactions which are set out at such length. It must be remembered, that under Order XIX., rule 17, every allegation of fact in a pleading, if not denied specifically or by implication, is to be taken as admitted. The statement of claim is accordingly too prolix, and the Defendant *Parry* is entitled, under Order XXVII., rule 1, to have the whole statement struck out as irrelevant, embarrassing, and an abuse of the practice of the Court: *Cashin* v. *Cradock* (1), or have it amended by striking out any matters which might tend to prejudice, embarrass, or delay the fair trial of the action, or are merely evidence of the facts on which the Plaintiffs intend to rely, and all such as do not raise any issue between the parties: *Watson* v. *Rodwell* (2); *Herring* v. *Bischoffsheim*, M. R. Feb. 17, 1876.

W. Pearson, Q.C., and *F. H. Colt*, for the Plaintiffs, were not called upon.

Judgment, V.-C. H.

HALL, V.C.:—

This motion must be refused with costs.

The Plaintiffs' case is one of a very special and peculiar character, and it appears to me that if they are entitled to relief under the circumstances which they have alleged in this statement of claim, it is right and proper, and I think necessary, that they should state in very considerable detail the nature of the case upon which they seek that relief. It appears to me that under the circumstances this statement of claim is reasonable and proper, and certainly within the provisions of Order XIX., rule 18, which require a party to state the facts on which he means to rely, so as to shew his case, and to prevent the opposite party being taken by surprise. I think that without great detail of the nature of this case the Defendants might have been able to say, "I never knew that I came here to meet this sort of case." The case, it must be observed, is one of liability founded upon a series of transactions, and upon conduct, not merely in reference to one particular person, but with regard to others in respect of matters that will have to be gone into, shewing, as it is said, that with reference to dealings and transactions in relation to this firm,

(1) 3 Ch. D. 376. (2) 3 Ch. D. 380.

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and its assets, there is a liability of these particular Defendants, or at all events, one of them. And although it be true that *Parry* personally may not have been implicated in some of these transactions, or that the case may not succeed against him, yet it may succeed as to others. I cannot strike out these allegations if they are relevant or material with regard to any one of the Defendants.

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Under these circumstances, although I am not all prepared to say that this pleading might not have been curtailed to some extent, or, as it is expressed in one of the cases upon this subject, that it might not be "pared away" in certain particulars, still I am not prepared to say that there has been such prolixity in the statement of claim as would lead me to require either that the whole be taken off the file or struck out; or that I should require it to be amended so as to curtail it. I think that would be a useless and idle course to take in the present case. The letters, or some of them, are set out more in detail, and some of the accounts are stated more in detail than they might have been. But from that having been done, the Defendants will, at all events, have the advantage of knowing that nothing has been kept back; that it is all there; and they will be able to judge what sort of case there is against them. As an instance of the length in detail of the statement of claim I think the observation with reference to setting out the release at great length was a just one; it might have been stated more shortly.

Looking therefore at the whole of the statement of claim, this does not appear to me to be a case in which I ought to exercise the jurisdiction of either striking it out altogether or requiring an amendment. Certainly I decline to go through and settle this statement of claim by striking out particular passages. I think that if I were to strike out all the particular passages which I was asked by Mr. *Hastings* to strike out, I should probably make the statement of claim such that the Defendants might have been taken by surprise upon the trial of the action.

The Defendant *Parry* appealed. The appeal was heard on the 11th and 12th of January, 1878.

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Hastings, Q.C., and *Crossley*, for the Appellant:—

The Vice-Chancellor held that the form of the statement of claim was justified by Order XIX., rule 18. We submit that that rule does not apply to a statement of claim, for it speaks of "previous pleadings."

[BAGGALLAY, L.J.:—The rule says "any pleading," and surely it is more required in a statement of claim than in any other pleading.

JAMES, L.J.:—"Previous pleadings" means "previous pleadings if any."]

At all events this statement of claim cannot be justified. The case is short, and might be stated very concisely. This statement of claim states facts which are irrelevant, as the resolutions conferring certain powers on the Russian administrators. The case intended to be made is put so vaguely that we do not know what we have to meet, and in spite of Order XIX., rule 4, a multitude of letters are set out which if they are relevant at all are merely evidence. Letters are set out at length, though Order XIX., rule 27, provides that it shall be sufficient to state their result. The claim is altogether in such a form that the Defendant is embarrassed, and it ought to be dealt with as in *Herring* v. *Bischoffsheim*, M. R. Feb. 17, 1876. This pleading is open to the same objections as the statement of claim in *Dawkins* v. *Lord Penrhyn* (1).

W. Pearson, Q.C., and *Colt*, for the Plaintiffs:—

Order XIX., rule 27, which is relied on by the Appellant, does not prohibit setting out letters *in hæc verba*, but only says it shall be sufficient to give the effect. It is a matter of discretion, as every pleader knows, whether a document shall be set out in full or not. Here the Vice-Chancellor has exercised his discretion, and the Court of Appeal will not interfere with it: *Golding* v. *Wharton Salt Works Company* (2); *Watson* v. *Rodwell* (3). Our case is a complicated one, depending on trust, fraud, and collusion,

(1) 6 Ch. D. 318. (2) 1 Q. B. D. 374.
(3) 3 Ch. D. 380.

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and, as the Vice-Chancellor said, is incapable of being stated shortly. We set out the letters containing certain representations, and state the result we deduce from them; stating a letter is stating a certain representation to have been made, it would be dangerous merely to state its effect. A general allegation of fraud without stating facts from which fraud can be inferred is demurrable.

[THESIGER, L.J.:—I do not see that you allege fraud in this statement of claim.]

It has never been held necessary in pleadings in Equity to allege fraud if facts are alleged which shew it. Order XIX., rule 25, does not vary this.

[BAGGALLAY, L.J., referred to Appendix C, Form 15.]

Then it was necessary to allege letters which we intend to use as admissions, the rule is so laid down in the books of Chancery practice.

[JAMES, L.J.:—That may have been the rule in old times when the evidence was taken behind the backs of the parties, but now the rules expressly say that evidence is not to be pleaded, and admissions are nothing but evidence.]

The statement of claim cannot be struck out in the absence of the other Defendants who have taken no objections to it.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the Appellant is entitled to the order which he asks. The old practice of the Court of Chancery as to exceptions for impertinence has not been continued, but under the practice which has been substituted for it, if the Defendant is embarrassed by the Plaintiff's mode of stating his case he is entitled to be relieved from his difficulty. Now nothing is more embarrassing to a Defendant than a number of statements which may be irrelevant, and with which he therefore does not know what to do. Almost every statement in this claim appears calculated to embarrass the Defendant in ascertaining what is the case which he has to meet. We have first a statement how *Froom* became bankrupt in *Russia*; then a balance-sheet of his affairs set out at length. Why was this inserted? It is said that it was

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put in for the purpose of comparing the figures with statements contained in certain letters, from which comparison certain conclusions can be drawn. The Defendant, finding this statement in the claim, knows that it is intended to be used, and goes to trial not knowing how it is to be used, but only that it is to be thrown at his head in the hope of making something out of it. Then we have a letter written by the debtor to one of his English creditors, giving an account of his assets and of the circumstances which have led to certain advice being given him by his solicitor, Mr. *Lischine*, and this is followed by a statement that Mr. *Lischine* continued to be his legal adviser. Why was that put in? We were told because Mr. *Lischine* was afterwards employed by the Defendants as their legal adviser. What then? It was perfectly innocent in the Defendants to employ the solicitor of the debtor as their legal adviser. The Plaintiffs reply that it supports a case of fraud and collusion. Then follows a statement of resolutions passed by a meeting of creditors, giving certain powers to the administrators, which occupies more than two printed pages. Why was this put in? The reason given was that the resolutions confer no authority on the administrators to sell the business. The document then is set out at length to prove a negative proposition which is nowhere averred. Shortly afterwards we have statements shewing that certain English creditors, including the Defendants, were minded to make certain arrangements for acting together to get rid of the creditors in *Russia*, and make the most of the debtor's property for the benefit of the English creditors. And a proposal was made for a scheme to which any of the English creditors might come in and assent. All this is set out at length. We then, in paragraph 17, have a long statement of the proceedings at a meeting of English creditors, at which two of the Defendants were pre sent, but the Plaintiffs apparently were not there. The fact is not distinctly stated. The bearing of this meeting on this suit I am unable to see. The law of *England* knows nothing of meetings of creditors acting on behalf of absent creditors except in cases falling within some statutory enactment. It is not stated that any arrangement was made for allowing other creditors to come in, and unless it is made to appear that the proceedings at this meeting were made the basis of something that afterwards took place

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between the Plaintiffs and the Defendants, everything done there was *res inter alios acta*. A statement of these proceedings is therefore irrelevant and embarrassing. We have next a resolution to which the creditors who agreed to join in carrying on the debtor's business were parties. What have the Plaintiffs to do with that? It is said that part of the resolutions is evidence supporting the Plaintiffs' case, but the Rules of Court expressly forbid the statement of evidence in pleading. The party is to state facts constituting the wrong of which he complains, and he is not to state evidence, whether consisting of admissions or not. The Defendant must make up his mind what he will traverse, and it is premature to enter upon the question of evidence before it is known of what facts evidence will be required. The subsequent part of the statement of claim is full of letters which passed between some of the Defendants and other persons not the Plaintiffs, and not in the same category with the Plaintiffs. How are the Defendants to deal with that as between themselves and the Plaintiffs. It is said that these letters are admissible as admissions tending to make out part of the Plaintiffs' case. As to this I must repeat the observation that to state evidence is expressly forbidden by the rules. Then we have a statement of a release which is set out at great length, and is introduced merely because the recitals furnish evidence by way of admissions. Such statements embarrass a Defendant; he has notice that these documents are going to be used against him, and ought to be told for what they are to be used. We are not hearing this case on demurrer, and I give no opinion whether the statement of claim shews any title to relief. But I cannot help thinking that the pleader found great difficulty in alleging any case shewing that any wrong had been done him. I am embarrassed, and no doubt the Defendant is so too. I do not know whether the Plaintiffs agreed to accept the 7*s.* 6*d.* in the pound or not; whether they are making a case as between vendor and purchaser, or as between principal and agent.

The argument was strongly pressed upon us that this was an appeal from a matter lying within the discretion of the Judge, and an observation of my own in *Watson* v. *Rodwell* (1) was relied

(1) 3 Ch. D. 380.

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Judgment, C. A. James, L.J.

on. I do not know whether my expressions were stronger than was required; but it is very important that time and money should not be wasted in appeals on interlocutory matters, and I have therefore always set my face against appeals from the discretion of the Judge in matters of procedure. But a Defendant may claim *ex debito justitiæ* to have the Plaintiffs' case presented in an intelligible form, so that he may not be embarrassed in meeting it; and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery. If pleadings such as this are to be allowed, the gentlemen who took such pains in the preparation of the rules may say, as *Oliver Cromwell* did after an unsuccessful attempt to reform abuses, "The sons of Zeruiah be too hard for me."

Baggallay, L.J. BAGGALLAY, L.J.:—

It has been strongly pressed upon us that we ought not to interfere with the discretion of the Court below. It is true that, as a general rule, the Court of Appeal will not interfere in matters of discretion—not for want of jurisdiction, but because, in the exercise of its own discretion it considers that the discretion of the Judge below had better not be interfered with, except in extreme cases. The present case is one in which, in my judgment, it ought to interfere. The complaint is that the statement of claim is prolix and embarrassing. The word "prolix" may be used to denote two different things; it may refer to the too lengthy statement of necessary facts, or to the statement of facts unnecessary to be stated. Where the only thing complained of is the statement at unnecessary length of things necessary to be stated, Order XIX., rule 2, appears sufficiently to meet the case; but the statement of unnecessary facts tends to embarrass the Defendant. Here I think that the statement of claim is embarrassing, both from the excessive length at which the statements of necessary facts are set out, and from the statement of unnecessary facts. The nature of the case, as appearing in the statement of claim, is shortly this: A firm went into liquidation according to the law of *Russia*. A meeting of their English creditors was held in *London*, and the creditors ranged themselves into two classes: creditors

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forming a syndicate, who were willing to advance money to carry on the business, to whom special advantages were offered; and creditors who were not to advance money and were to receive 7*s.* 6*d.* in the pound on their debts. Persons representing the English creditors went to *Russia*, received the assets, bought part of the assets at an insufficient price, and received enough to pay to the non-syndicate creditors a dividend. That is the whole of the case, and yet the statement of claim exceeds 200 folios. The necessary statements are put in so vague a form that the Appellant cannot know how he is to deal with the irrelevant statements. It is impossible to collect from the statement of claim whether the Plaintiffs were parties to the resolutions of February or not, and whether they became *cestuis que trust*. Then a long correspondence between the trustees and other creditors is set out, and the Appellant cannot easily understand whether he is to be affected by these matters or not. Sweeping general charges follow, and the Appellant is embarrassed by the difficulty of knowing how far an admission of all the facts alleged will support them. There is a charge that the Defendants, by their conduct, prevented the Plaintiffs from giving proper notices, but the only reference to their conduct is to be found in some of the letters set out. It is impossible not to see that the Defendants are embarrassed by such a way of presenting a case.

Judgment, C. A. Baggallay, L.J.

THESIGER, L.J.:—

Thesiger, L.J.

I also am of opinion that this statement of claim ought to be struck out. It offends against the rules both by needless prolixity and by stating evidence. The case as put in the argument on behalf of the Plaintiffs rested on a few and simple facts which might have been pleaded very shortly. They might be set out in a few words, instead of which we have a statement of claim of forty-five pages, of which the greater part consists of letters set out in full, which could at most only be evidence by way of admission. The proceedings in *Russia* are set out at great length, though nothing more was material to be stated than the fact that there was an administration in *Russia* of the estate of the debtor, and that some of the creditors in *England* took proceedings with a view of getting rid of the Russian creditors, and putting an end

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Judgment, C. A. Thesiger, L.J.

to the Russian administration. Instead of this we have statements occupying seven pages about the proceedings under the Russian administration, culminating in a full copy of a document taking up two pages, shewing what powers were vested in the Russian administrators. No answer was given to the question why this document was set out at length, except that there might be some question of Russian law arising at the trial for which this document might be material. The Defendant's reply to that is fatal—that Russian law must be pleaded as a matter of fact, and not inferred from documents. The whole of these seven pages of statement come to no more than this, that there was an administration in *Russia* under which certain powers were vested in the administrators, and that this state of things was the inducement to what followed. As regards the resolutions of the English creditors, I do not object to their having been set out in full, for they are material. There is, however, no justification for setting out a multitude of letters in full, they are of no use but for this purpose—to shew that the Defendants acted as trustees for all the English creditors, and that they neglected their duty. These letters then are not part of the Plaintiff's case, but only evidence of his case. The case is a simple one, though the proof of it may be very complicated. The case appears to be that it was the duty of the trustees to communicate certain facts to the English creditors—that they did not do so, and thus got an opportunity of acquiring the property for their own benefit. We have then an arrangement between the trustees and the syndicate creditors, and a release by the latter to the former is set out verbatim, for the purpose of using the recitals as evidence, the mere statement of the fact that a release was executed being sufficient for every other purpose. I am disposed to agree with the contention that the mere stating material facts at too great length would not justify striking out a statement of claim. But when in addition to the lengthy statement of material facts we find long statements of immaterial facts, and of documents which are only material as evidence, a Defendant is seriously embarrassed in finding out what is the case he has to meet. A further objection to the form of the statement of claim is furnished by the argument on behalf of the Plaintiffs. They say that they allege first that the Defendants

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are trustees, and therefore bound to account; secondly, that the Defendants, if not trustees for the Plaintiffs, are liable to them on the ground of fraud, and (which comes to much the same thing) of collusion. Now, in any properly constituted system of pleading, if alternative cases are alleged, the facts ought not to be mixed up, leaving the Defendant to pick out the facts applicable to each case; but the facts ought to be distinctly stated, so as to shew on what facts each alternative of the relief sought is founded. The form No. 5 in Appendix C. to the General Rules shews how such a pleading ought to be framed, the facts there are marshalled so that the Defendant knows what he has to meet. I attach no blame to the pleader in the present case, I have come here too lately to have lost the recollection of the difficulty of framing pleadings satisfactorily. But though counsel may have done their best, and shewn their skill in the preparation of statements of claim, it is not the less the duty of the Court to shew its skill in preventing Defendants from being embarrassed in their defences.

There is another still stronger objection to this statement of claim. The Plaintiffs say that fraud is intended to be alleged, yet it contains no charge of fraud. In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think that this cannot be correct. It may not be necessary in all cases to use the word "fraud"—indeed in one of the most ordinary cases it is not necessary. An allegation that the Defendant made to the Plaintiff representations on which he intended the Plaintiff to act, which representations were untrue, and known to the Defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the Defendant —that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention.

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As regards the right to appeal in a case of this nature, I agree that we ought not to be ready to interfere in a case which in some degree depends on the discretion of the Judge; but there being a right of appeal, I think we are bound to exercise our own discretion as to the case being one in which an appeal ought to be allowed.

The statement of claim was directed to be struck out, with liberty to the Plaintiffs to deliver a fresh one within a month. The Plaintiffs to pay the costs both before the Vice-Chancellor and the Court of Appeal, including the costs incurred by the Appellant by reason of the delivery of the statement of claim.

Solicitors: *Scott & Barham; Hunt & Son.*

C. A. 1877 Dec. 15, 17. 1878 Jan. 15.

GRAHAM *v.* CAMPBELL.

[1877 G. 15.]

Practice—Appeal for Costs—Interlocutory Injunction—Undertaking as to Damages.

C. having, through *D.* his agent, agreed to sell a property to *F.*, *G.*, alleging a prior contract for sale to himself, commenced an action against *C.*, *D.*, and *F.* for specific performance, and, in default, for damages against *C.* and *D.*, and obtained an interlocutory injunction restraining *C.* and *F.* from completing the sale, *G.* giving the usual undertaking as to damages, *Malins*, V.C., *held* that no contract had been entered into with *G.*, and dismissed the claim with costs as against *F.*, but as against *C.* and *D.* without costs, considering the conduct of *D.* blameable, and refused to give any inquiry as to damages. *C.* and *D.* appealed, on the ground that the dismissal ought to have been with costs, and that an inquiry as to damages ought to have been granted. *G.* presented a cross appeal asking for damages against *C.* and *D.* The Court of Appeal (*James*, *Cotton*, and *Thesiger*, L.JJ.) agreed with the Vice-Chancellor that there was no contract between *C.* and *G.*, but did not agree with him in his unfavourable view of *D.*'s conduct:—

Held, that *C.* was entitled to damages under the undertaking, for that, unless under special circumstances, effect ought to be given to such an undertaking when an injunction turns out to have been wrongly granted, but that in the present case, as the only possible damage was that *C.* had been delayed in receiving the purchase-money, an inquiry would not be directed, but *C.* should receive from the Plaintiffs interest at £5 per cent. on the

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purchase-money, minus any interest actually made by him, the amount to be verified by affidavit:

Held, that *C.* and *D.* were entitled to the costs of both appeals, but that although *C.*'s appeal was not for costs alone, and by reason of that fact and of the cross appeal the whole case had been heard, the Court was not at liberty to vary the order of the Court below as to costs:

Held, also, that where a Defendant has had notice of motion for an injunction, it is improper to grant an injunction against him *ex parte*, though the pressure of business may be such as to prevent the motion on notice from being brought on.

An interlocutory injunction ought to be made upon an undertaking for damages.

Statement.

THE Defendant *Campbell*, who was a mortgagee with power of sale of a reversionary interest in stock, was minded to sell it, and employed Mr. *Dawson*, his solicitor, to find a purchaser. The Plaintiffs and the Defendant *Ford* were both desirous of purchasing, and a bargaining by each party with *Dawson*, as agent of *Campbell*, went on for several months. On the 2nd of January, 1877, an interview took place between one of the Plaintiffs and *Dawson's* partner, followed by some communications on the 4th which the Plaintiffs alleged to constitute an agreement for sale to the Plaintiffs. In the meantime, on the 3rd of January, a written agreement for sale to *Ford* was signed. *Campbell* denied any agreement to sell to the Plaintiffs, and the Plaintiffs commenced their action against *Campbell*, *Dawson*, and *Ford*, asking for specific performance, and in the alternative for damages against *Campbell* and *Dawson*, and asking also an injunction to restrain *Campbell* and *Ford* from completing their contract.

The Plaintiffs gave notice of motion before Vice-Chancellor *Malins* for an injunction, and on the 15th of March the motion came on, but was not heard out, and was directed to stand over till the 10th of April, an injunction until that day being granted, and the Plaintiffs giving the usual undertaking as to damages. On the 10th of April the Vice-Chancellor directed the motion to stand over till the next motion day, the 19th of April. It was mentioned again on the 19th, and again stood over. On the 3rd of May it was opened, but was ordered by the Vice-Chancellor to stand over till the first motion day in Trinity sittings, nothing being said about continuing the injunction. *Ford* gave notice to the Plaintiffs that he should complete his contract unless

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C. A. 1878 GRAHAM v. CAMPBELL. Statement.

restrained. The Plaintiffs thereupon moved *ex parte* on the 8th of May, and obtained an injunction till the first motion day in Trinity sittings, giving the usual undertaking as to damages. On the 29th of May (the first motion day in Trinity sittings), the adjourned motion was again opened, and an order made which recited that of the 8th of May, and continued the injunction, the Plaintiffs undertaking as to damages being also continued. Ultimately an arrangement was come to for bringing on the motion again, and treating it as the trial of the action. The Vice-Chancellor held that the case of the Plaintiffs failed, for that no concluded agreement for sale to them had been come to, and he dismissed the claim with costs as against *Ford*, but without costs as against *Campbell* and *Dawson*, expressing a very unfavourable view of *Dawson's* conduct, and saying that *Campbell*, though he had personally taken no part in the negotiations, was answerable for the conduct of his solicitor, and therefore could not receive costs. His Lordship refused to grant an inquiry as to damages under the undertaking.

Campbell and *Dawson* jointly appealed, on the ground that the dismissal ought to have been with costs, and that an inquiry as to damages ought to have been granted. The Plaintiffs gave a cross notice of appeal, asking for a decree for damages against *Campbell* and *Dawson*. The appeals were heard on the 15th and 17th of December, 1877.

Argument.

Higgins, Q.C., and *Dundas Gardiner*, for *Campbell* and *Dawson*:—

The dismissal ought to have been with costs as against both these Defendants. The conduct of *Dawson* is not open to imputation, and he was not properly made a party. The question, therefore, is one of principle. The injunction turns out to have been wrongly obtained. An inquiry as to damages is therefore *ex debito justitiæ*, and the appeal not being only as to costs, the Court can deal with the question of costs also, as was regularly done under the old practice.

Glasse, Q.C., and *Rendall*, for the Plaintiffs:—

This Court has no power to allow an appeal as to costs: *Judicature Act*, 1873, s. 49; and we submit that the Court has a discre-

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tion as to whether the undertaking as to damages should be enforced.

Gardiner, in reply.

Judgment.

1878. Jan. 15. JAMES, L.J., delivered the judgment of the Court (*James*, *Cotton*, and *Thesiger*, L.JJ.), and after stating the facts of the case down to the institution of the action, continued:—

In assertion of their claim for specific performance the Plaintiffs asked for an injunction to restrain the Defendants *Campbell* and *Ford* from completing their contract, and obtained an injunction accordingly for a short time, and gave the usual notice to extend it. That motion was never heard, for reasons connected with the pressure of business in the Court of the Vice-Chancellor, but the Defendants giving formal notice that they should not consider themselves bound by the injunction which had expired, the Plaintiffs applied for and obtained a further *ex parte* injunction. This appears to us a somewhat novel proceeding, of which we must express our disapproval. A Defendant who has had notice of motion for an injunction which he is willing and ready to meet, ought not to have that injunction issued against him *ex parte*. If from the other engagements of counsel or the pressure of other business on the Court the Plaintiff cannot bring on his motion, the inconvenience of this should fall on him, not on the Defendant, who is really harassed and punished as a wrongdoer without an opportunity of being heard.

[His Lordship then stated the result of the trial before the Vice-Chancellor and the nature of the appeals, and continued:—]

We agree with the Vice-Chancellor that the Plaintiffs' case wholly failed. It is clear that no contract whatever was concluded with the Plaintiffs, there was no offer to them accepted by them, and no offer by them accepted by the other side.

Neither can the Plaintiffs maintain their action as one for deceit. It is not suggested that *Campbell* made any representation, and although there are against *Dawson* allegations, not however of a very precise character, it is not established that the Plaintiffs, in consequence of any representation of *Dawson*, did or abstained from doing any act from which act or omission they

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suffered damage, and we think it right to add it is not established that any misrepresentation was made by *Dawson*.

The cross appeal therefore fails.

On the original appeal, so far as it is an appeal for costs, we are precluded by express legislation from entertaining it.

The dismissal of a bill without costs was pre-eminently the case to which the rule of not hearing appeals for costs applied. And although by reason of the cross appeal and the other matter appealed from, we have had to hear the whole case, the provisions of the *Judicature Act* do not, in our opinion, allow us to make that a ground for varying the decree as to costs. The inquiry as to damages is a matter wholly collateral, and the failure of the cross appeal leaves the Defendants' appeal as to the suit an appeal merely for costs. As this was pressed on us very strongly as a matter of character affecting Mr. *Dawson*, the solicitor, we think it right to add that we do not concur in the view taken of his conduct by the Vice-Chancellor.

He was an agent for sale, and on behalf of his principal made the most of the rivalry of two competitors eager to purchase. His duty was to get the most he could for his principal *per fas* but not *per nefas*, and he does not appear to have done anything which can be described as *nefas*.

As to the other subject of appeal, the inquiry as to damages, we think the Defendant *Campbell* is clearly entitled to have all damage sustained by him by reason of the injunction. The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so. In this case we should therefore have granted the Defendant *Campbell* the inquiry he asks for as to damages. But as the legal wrong which he has suffered was being kept many months out of his money, and as the law does not regard collateral or consequential damages arising from delay in the receipt of money, it is not right to direct an inquiry on a matter on which we can satisfy

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C. A. 1878 GRAHAM v. CAMPBELL. Judgment.

ourselves. He is entitled to interest at 5 per cent. during the delay, minus any interest he may have made, and we will take his affidavit verifying that amount.

As to the costs of the appeal, the cross appeal having wholly failed, and the other appeal having succeeded as to the damages (the costs of which have not been increased by *Dawson's* joining), we think the Appellants *Campbell* and *Dawson* ought to have all costs in this Court.

Solicitors: *Dawson, Bryan, & Dawson; Mayhew, Salmon, & Whiting.*

FAITHFULL *v.* EWEN.

C. A. 1878 Jan. 15

[1874 F. 68.]

Lien of Solicitor—Charging Order—Mortgage by Clients—Priority—Solicitors Act (23 & 24 *Vict. c.* 127), *s.* 28.

The Plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the Defendants. This mortgage was sent to the solicitor of the Plaintiffs for his perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the Plaintiffs' solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under 23 & 24 Vict. c. 127, s. 28, on the interests of the Plaintiffs:—

Held, by the Master of the Rolls, that the charge ought to be postponed to the mortgage to the Defendants.

Held, on appeal, that as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the Plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment.

Statement.

THIS was an appeal against an order of the Master of the Rolls, made in the suit of *Faithfull* v. *Ewen* and in the matter of the statute 23 & 24 Vict. c. 127, whereby he declared that Mr. *Brook*, who had acted as the solicitor of the Plaintiffs in the suit, was entitled to a charge upon the shares and interests of the Plaintiffs in the property recovered and preserved, or to be recovered and preserved, by the proceedings in the suit for the amount of his taxed bill of costs and charges and expenses as such solicitor, but that such charge was to be subject to an indenture dated the 1st of

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September, 1876, and to the charge thereby created in favour of the Defendants *Ewen* and *Clark*.

No question was raised on the appeal as to the propriety of the order so far as it created a charge in favour of Mr. *Brook*, but he appealed against so much of the order as declared his charge to be subject to the charge of the Defendants *Ewen* and *Clark*.

The Defendants *Ewen* and *Clark* were the trustees of the will of *Robert Faithfull;* the Plaintiffs and the Defendant *Caroline Hills Lucy Gravins* were the daughters and only children of the testator, and the Defendant *Sarah Maxwell Webb* was his widow. She had, after his death, married *William Webb*, who died before the institution of the suit.

By his will, dated the 13th of November, 1833, the testator gave his residuary estate in trust to pay the income to his widow during her life if she should so long continue his widow, and in case she should marry again, then to pay to her one moiety only of the income, and after her decease or second marriage, but in case of her second marriage, subject to her life interest in one moiety of the income, upon trust to divide his residuary estate equally between his children, the share of each daughter to be held in trust to pay the income to her during her life for her separate use without power of anticipation, and after her decease in trust to pay the same as she should by will appoint, and in default of appointment in trust for her executors or administrators, according to the *Statute of Distributions* in case she had died intestate.

By the bill in the suit of *Faithfull* v. *Ewen*, filed in 1874, it was sought to charge the Defendants *Ewen* and *Clark* with a sum of £14,302 3*s.* 11*d.* alleged to have been improperly dealt with by them in the course of the administration of the testator's estate; and by the decree made on the 24th of November, 1875, amongst other directions and inquiries, an inquiry was directed how the said sum had been invested or applied or disposed of.

The indenture of the 1st of September, 1876, mentioned in the order appealed from, was made, between the Defendant *Sarah Maxwell Webb* of the first part, the Plaintiffs of the second part, and the Defendants *Ewen* and *Clark* of the third part. It contained recitals to the effect, amongst other things, that the Defendants *Ewen* and *Clark* had advanced to the Plaintiffs and the

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Statement.

Defendant *Sarah Maxwell Webb*, or some or one of them, moneys to the amount in the aggregate of £8303 5*s.* 5*d.*, being parts of the sum of £14,302 3*s.* 11*d.* which was sought to be recovered in the suit, and that in making such advances the Defendants *Ewen* and *Clark* had committed breaches of trust in respect whereof they might be called upon to make good the said capital sum of £8303 5*s.* 5*d.* and the income thereof and by the said indenture the Plaintiffs and the Defendant *Sarah M. Webb*, in consideration of the premises and of the sum of £1200 then advanced to them by the Defendants *Ewen* and *Clark* out of their own moneys, jointly and severally covenanted with the Defendants *Ewen* and *Clark* for the repayment to them of the said sum of £1200, and also of all such sums as they might pay in replacement of the £8303 5*s.* 5*d.*, with interest upon such several sums respectively, and for the indemnity of the Defendants *Ewen* and *Clark* in respect of the breaches of trust so committed by them; and the Defendant *Sarah M. Webb* and the Plaintiffs charged their beneficial interests under the will of the said *Robert Faithfull* with the performance of the covenants so entered into by them.

It appeared that the negotiations for the loan of £1200 were conducted by Mr. *Nokes*, the solicitor of Mrs. *Webb*, and Messrs. *Beaumont & Warren*, the solicitors of the trustees; and that Mr. *Nokes*, having received from Messrs. *Beaumont & Warren* the draft of the proposed mortgage and indemnity, forwarded it to Mr. *Brook* for approval on behalf of the Plaintiffs. Mr. *Brook* was not present when the deed was executed by his clients, the Plaintiffs; but upon the evidence the Court held that he must be considered to have been aware of the intention of all parties to execute the deed and to have sanctioned the execution of it by the Plaintiffs. On the petition of Mr. *Brook* the order under appeal was made, and on the same day, by the order on further consideration, the life interests of the Plaintiffs and Mrs. *Webb* were impounded to make good the sums received by them out of the trust funds.

Argument

Chitty, Q.C., and *Caldecott*, for *Brook*:—

There is no reason for postponing the solicitor's charge. A person who knows of the suit has notice that costs must have been

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C. A. 1878 FAITHFULL v. EWEN. Argument.

incurred: *In re Fiddey* (1); *Haymes* v. *Cooper* (2). The mortgagees therefore should have asked whether the costs had been paid, and whether Mr. *Brook* intended to forego his claim. *In re Snell* (3) is entirely different; the same solicitor was acting for mortgagor and mortgagee, and the case rested on the duty he owed to the mortgagee. Moreover, the case was not one of a charge under the Act. *Hicks* v. *Keate* (4), a case before the Act, illustrates the same principle.

Davey, Q.C., and *G. B. Edwards*, for the trustees:—

We contend that a solicitor who settles a mortgage on behalf of his clients cannot afterwards set up a lien of his own against it. At the time when the mortgage was made *Brook* had no charge. *Morse* v. *Cooke* (5) offers an analogy in our favour.

Bond Cowe, for Mrs. *Webb* and the Plaintiffs.

Caldecott, in reply.

Judgment.

1878. Jan. 15. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) was now delivered by

BAGGALLAY, L.J., who, after stating the facts as above, continued:—

It is insisted, on behalf of the Respondents, that inasmuch as Mr. *Brook* was cognisant of the arrangement under which the Defendants *Ewen* and *Clark* were about to advance their money, and did not in any way assert his rights under the statute though he had every opportunity of doing so, he must be treated as having waived them in favour of the Defendants.

We are unable to adopt this view. The Defendants *Ewen* and *Clark* and their advisers were of course aware of the pending suit, and they must have known, or must be presumed to have known, the rights which the solicitor of the Plaintiffs was entitled to under the statute. If they desired that the Defendants should have a charge paramount to Mr. *Brook's* statutory charge for costs,

(1) Law Rep. 7 Ch. 773.
(2) 33 Beav. 431.
(3) 6 Ch. D. 105.
(4) 3 Jur. 1024.
(5) 13 Price, 473.

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they should have inquired of him whether his costs had been paid, or, if they had not, whether he was willing to forego his rights in their favour. No consideration was given to Mr. *Brook* for any such waiver, no question was asked him; he misstated nothing, he concealed nothing; no one can be heard effectually to say that he was misled by him.

When the matter was before the Master of the Rolls the question chiefly in dispute, so far as we can judge from the shorthand notes of his judgment, appears to have been whether Mr. *Brook* was entitled to a charging order; and the question whether, assuming him to be so entitled, the charge in his favour should be made subject to the charge created in favour of the Defendants by the indenture of the 1st of September, 1876, does not appear to have been much discussed.

However this may be, we are of opinion that the order of the 9th of July, 1877, should be varied by omitting the declaration of the priority of the charge created by the indenture of the 1st of eptember, 1876.

Mr. *Brook* and the Defendants must be at liberty to add their costs of the appeal to their respective charges.

There is one other circumstance connected with this case to which reference has been made in the course of the argument, and as to which it may be well that no mistake should arise. By the order on further consideration made in the suit of *Faithfull* v. *Ewen* on the same day as the order appealed from, the life interests of the Plaintiffs were impounded to make good the losses in the trust funds arising from the breaches of trust committed by the trustees and participated in by the Plaintiffs and the Defendant *Sarah Maxwell Webb*. The shares and interests of the Plaintiffs upon which Mr. *Brook* is entitled to a charge under the order will, of course, be their beneficial interest actually recovered or preserved in the suit, viz., such shares and interests only as will remain after complying with the directions in the order on further consideration.

Solicitors: *Brook; Beaumont & Warren; W. F. Nokes.*

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C. A. 1878 Jan. 16.

NORTHAMPTON COAL, IRON, AND WAGGON COMPANY v. MIDLAND WAGGON COMPANY.

[1876 N. 127.]

Practice—Appeal from Order in Chambers—Security for Costs—Amendment making new Case—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.

An action was commenced by a limited company which was in course of liquidation. The Defendants put in a defence, counter-claim, and demurrer, and subsequently obtained an order for inquiries. After this, and about ten months after the original statement of claim had been delivered, the Plaintiffs obtained an order to amend, and made amendments raising a fresh case likely to require a great mass of additional evidence. The Defendants thereupon applied to have security for costs, which was refused by *Malins*, V.C., in Chambers, but no certificate that he did not desire the case to be further argued was applied for:—

Held, that on a point of this kind an appeal direct from Chambers ought to be allowed:

Held, also, that as a new case which would cause a great increase of expense had been raised by the amendment, security for costs ought to be given.

Statement.

THIS was an appeal by the Defendant company from a refusal by Vice-Chancellor *Malins* to order the Plaintiff company to give security for costs.

At the time when the action commenced the Plaintiffs, a limited company, were under liquidation, a resolution to wind up having been passed on the 19th of July, 1876. The writ was issued on the 21st of December, 1876, and the statement of claim delivered on the 10th of January, 1877. The Defendants on the 21st of February, 1877, delivered by leave a demurrer, together with a statement of defence and counter-claim. The demurrer was heard and overruled. On the 10th of March, 1877, the statement of claim was amended by order. The action went on, and a preliminary inquiry was directed on the application of the Defendants. After this, on the 21st of November, 1877, the Plaintiffs obtained another order for leave to amend their statement of claim, and made extensive amendments raising a new case, the character of which is stated in the judgment of the Master of the Rolls. The Defendants, on this statement of claim being delivered, applied in

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Chambers that the Plaintiff company might be ordered to give security for costs. The matter was adjourned to be heard by Vice-Chancellor *Malins* in person, and his Lordship, on the 12th of December, refused to order any security to be given. The Defendants did not move before the Vice-Chancellor, but appealed direct to the Court of Appeal, without obtaining any certificate that the Vice-Chancellor did not desire to hear further argument.

Argument.

Beale, for the Appellants:—

There is abundant evidence to satisfy the requisitions of the *Companies Act*, 1862, s. 69, and security ought to be given. No doubt, if the Plaintiffs' case had not been altered, we should have had difficulty in answering the objection that we ought to have come sooner, but the amendments introduce a new case, which will make the action enormously more expensive.

Locock Webb, Q.C., and *J. Chester*, *contrà*:—

The Court will not take this appeal direct from Chambers without the Judge's certificate: *In re Elsom* (1). The evidence does not shew the Plaintiff company to be insolvent, and the Defendants knew at the commencement of the action that the company was in course of winding-up, and ought to have applied earlier.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Malins*, made at Chambers, refusing an application on the part of the Defendants that the Plaintiffs should give security for costs.

The first point taken was that the Appeal Court could not entertain the appeal at all, as it came direct from Chambers. Now, I must say that in the case of a mere point of practice like security for costs, it seems to me oppressive on the suitor, who is already liable to pay quite enough costs in the conduct of his litigation, to say to him, You shall not appeal unless you argue the case over again before the Judge in Court, with the assistance of counsel, whose assistance, of course, is to be obtained only on terms which add very materially to the costs of the action. Therefore, I think it is quite right in a matter of this kind that the

(1) 6 Ch. D. 346.

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NORTHAMPTON COAL, IRON, AND WAGGON COMPANY v. MIDLAND WAGGON COMPANY.

Judgment, Jessel, M.R.

Court should entertain the appeal at once, so as finally to decide the matter with as little expense and delay as possible.

The second point made was that this is a matter in the discretion of the Court below. Of course in a sense it is, but not so that the Court of Appeal cannot examine into the grounds of the exercise of the discretion. It is not one of those cases which are what I may call purely discretionary cases. I must say that, sitting as a Judge of first instance, I am in favour of allowing as much liberty of appeal as possible. I think it is the best check upon the Judge, but when sitting as a Judge of the Court of Appeal I am afraid I must not take the same view, for appeals are expensive and very often dilatory, though not so now in this Court, and it is not desirable to encourage frivolous appeals or appeals on questions of discretion.

The next question is that of time. It is said that the Defendants should have come earlier. The case had gone so far that a demurrer had been overruled, and a reference had been taken to one of the official referees on an inquiry. The answer given to that, and it appears to me a sufficient answer, is, that after all these proceedings a new case had been made differing materially from the case originally made—that the new case would lead to a great increase of the costs, and that therefore on that ground the Defendant company might say, We do not wish now to go on without some security for costs. I think, on examining the pleadings, that this is so. The original case shortly is that the Defendants the *Waggon Company* bribed two of the directors of the Plaintiff company by paying them £1 a waggon to induce their co-directors to enter into a contract for the supply of waggons at too high a price. The Defendants in their answer deny this, but say that they did pay the two gentlemen who introduced the contract their usual commission of £1 a waggon, the contract being for the supply of waggons at £14 per waggon per annum for seven years. The statement of claim is then amended, and the effect of the amendment is this: the Plaintiffs not only say that the contract was at too high a price, but they say, "You, having bribed our two directors, who, as you knew, would inspect the waggons, sent waggons of a bad quality, not made according to the specification of the contract, and which you knew to be unsuitable for our

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business. You did this, relying upon the bribe which the directors had accepted. Those directors inspected the waggons, and, under the influence of the bribe, accepted them, although insufficient and improper." On this ground the Plaintiffs contend that, instead of paying what they originally offered to pay, a fair price according to the contract, that is, the price which ought to be paid for waggons constructed according to the specification in the contract, they ought to pay merely what ought to be paid for the bad, insufficient, and improper waggons which they allege to have been supplied.

It is obvious that this new case will let in a great deal of evidence not required by the original case, and a number of facts wholly inapplicable and irrelevant to it, and of course thereby the costs will be greatly increased. I think that is a sufficient reason for the Defendant company coming now for security for costs.

The next point is, are they entitled to such security? Well, the *Companies Act*, 1862, s. 69, says that where a limited company is Plaintiff, any Judge having jurisdiction in the matter may, "if it appears by any credible testimony that there is reason to believe that if the Defendant be successful in his defence the assets of the company will be insufficient to pay his costs," require sufficient security to be given for such costs. I should say that the fact of the Plaintiff company being in liquidation would be sufficient "reason to believe" the assets to be insufficient unless evidence to the contrary was given. [His Lordship then referred to the evidence as not rebutting but strengthening this *primâ facie* case.] It appears to me, therefore, that the Appellants are entitled to what they ask.

JAMES, L.J.:— James, L.J.

I am of the same opinion. With regard to the question as to our entertaining the appeal, I may say that this is not like an appeal from an order as to some preliminary proceedings for putting a case in train for trial. As to such matters, it is very important that appeals should be strictly kept down, because they only involve both parties in great and unnecessary expense. But I consider security for costs to be *ex debito justitiæ*, and it is a very important matter whether a suitor is likely, if successful, to be able

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NORTHAMPTON COAL, IRON, AND WAGGON COMPANY v. MIDLAND WAGGON COMPANY.

to obtain payment of his costs. Therefore I think he is as much entitled to appeal in a case of that kind as upon any other case.

THESIGER, L.J.:—

I am of the same opinion.

Security to the amount of £150 was ordered to be given.

Solicitors: *Sharpe, Parkers, & Co.; Miller & Miller.*

C. A. 1878

Jan. 16.

WALTERS *v.* WOODBRIDGE.

[1863 W. 87.]

Trustee—Costs, Charges, and Expenses—Costs of Trustee defending Suit—Charges of Personal Fraud against Trustee.

The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately, and at the hearing Lord *Romilly* dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—

Held (reversing the decision of Lord *Romilly*, M.R.), that the trustee was entitled to be paid his costs out of the estate as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character.

Statement.

THIS was an appeal by the Defendant *J. M. Teesdale* from the decision of the late Master of the Rolls refusing an application by summons to have *Teesdale's* costs of a suit of *Woodbridge* v. *Teesdale* [1868 W. 265] taxed as between solicitor and client, and paid out of the funds in Court in this suit.

Frederick Woodbridge, the testator in the cause, died on the 1st of October, 1858, leaving a will, of which the testator's wife,

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Harriet Woodbridge, his son *William Woodbridge*, and the above-named *J. M. Teesdale*, were the executors and trustees.

The testator up to his decease was a partner in a brewery called the *Red Lion Brewery*. There was considerable difficulty in ascertaining the value of the testator's share and interest therein, and ultimately, after much negotiation, an agreement was come to on the 9th of March, 1860, for the sale of such share and interest to the surviving partner for £35,000, with interest at £5 per cent. per annum from the 5th of July, 1859.

On the 16th of April, 1860, the trustees filed their bill (*Woodbridge* v. *Woodbridge*) against the persons beneficially interested under the will, asking for a declaration that it was for the benefit of the persons interested in the testator's estate that the agreement of the 9th of March, 1860, should be carried into effect, and that the trustees might be authorized to carry it into effect, and that if the Court should be of opinion that it ought not to be carried into effect, then directions might be given as to realizing the testator's share in the brewery. The infant children of the testator's son *Frederick Woodbridge*, whose share in the testator's residuary estate was settled by the will, were among the Defendants. *Teesdale* was a solicitor, and his firm acted as solicitors for the Plaintiffs in that suit, and for all the Defendants except *Frederick Woodbridge* and his wife and children.

The cause was heard as a short cause on the 21st of July, 1860, and a decree made which declared it to be for the benefit of the persons interested in the testator's estate that the agreement of the 9th of March, 1860, should be carried into effect, and authorized the Plaintiffs to do so, and directed them to retain and pay the costs of all parties as between solicitor and client out of the estate.

In April, 1863, Mrs. *Walters*, a daughter of the testator, filed her bill in this cause to enforce a covenant by the testator contained in her marriage settlement for payment of an annuity, and to have the testator's estate administered, and a decree for that purpose was made.

In December, 1868, a bill (*Woodbridge* v. *Teesdale*) was filed in the name of the infant children of the testator's son *Frederick Woodbridge*, by *J. Hancock*, as their next friend, against the

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trustees of the will, and the testator's sons and his daughters and their husbands, for the purpose of setting aside the decree in *Woodbridge* v. *Woodbridge* on the ground that it had been fraudulently and improperly procured, and it asked that the trustees might be ordered to repay to the testator's estate the costs retained or paid by them pursuant to the decree in *Woodbridge* v. *Woodbridge*, and might be ordered to pay the costs of *Woodbridge* v. *Teesdale*.

The bill in *Woodbridge* v. *Teesdale* alleged that the bill in *Woodbridge* v. *Woodbridge* was filed by *Teesdale's* firm as solicitors for the Plaintiffs, and that they also appeared for all the Defendants therein except *Frederick Woodbridge* and his wife and children, and that the decree was made by the Court in the belief that all facts favourable to the interests of the residuary legatees of the testator were fairly stated, which had not been done owing to the misconduct of *Teesdale* in conducting the negotiations which led to the agreement of the 9th of March, 1860, and in stating the nature of the compromise contained in that agreement. The bill alleged that *Teesdale* for many years previously to the death of the testator had conducted the legal business of the brewery, that such business was very profitable, and that *Teesdale* accordingly was anxious to keep on good terms with the surviving partner, and for that purpose became privy to his acquiring the testator's interest in the business on the most favourable terms; that *Teesdale's* interest as solicitor to the brewery was directly opposed to his duty as one of the testator's executors, but that nevertheless he acted as such executor and as the sole legal adviser of his co-executors in the negotiations which resulted in the agreement and in the decree confirming it, and that he acted in collusion with the private solicitor of the surviving partner, who was a very large creditor of the brewery. As against *William Woodbridge*, the bill alleged that for some time after the testator's death he expected to be admitted as a partner into the brewery, and that as the testator had directed a considerable sum to be left in the brewery for his benefit if he became a partner, it was his interest to have the assets valued at a low figure, and that his interest as such expectant partner was greater than his interest as one of the residuary legatees, and was opposed to his duty as executor.

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As against the widow it was alleged that she knew the circumstances as to *Teesdale* and *W. Woodbridge*, yet allowed herself to be guided by them, and that she was guilty of a breach of trust in not insisting that the interest of the testator's estate should be protected by some person having no adverse interest.

On the 12th of January, 1869, *Teesdale* applied in *Walters* v. *Woodbridge* that he might be at liberty to defend the suit of *Woodbridge* v. *Teesdale*, and that his costs of so doing might be allowed him out of the estate. The Master of the Rolls held that as the bill in *Woodbridge* v. *Teesdale* contained charges of misconduct against *Teesdale*, no order could be made until the result of that cause was known, and his Lordship accordingly directed the summons to stand over till that cause had been decided.

Woodbridge v. *Teesdale* came on to be heard before Lord *Romilly*. His Lordship reserved judgment, and on the 18th of April, 1871, dismissed the bill with costs, being of opinion that the agreement of the 9th of March, 1860, was a proper one and beneficial to the estate, that the decree sanctioning it had been properly obtained, and that the charges of misconduct contained in the bill were unfounded.

The costs of *Teesdale* were taxed and execution issued against the next friend, to which the sheriff returned *nulla bona*. *Teesdale* then took out a summons in the administration suit to have his costs of *Woodbridge* v. *Teesdale* as between solicitor and client paid out of the testator's estate.

Lord *Romilly* considered that he had no jurisdiction to order payment of these costs, for that the suit was defended by the trustee solely to clear his own character, and with some expressions of regret his Lordship dismissed the application on the 18th of April, 1872 (1).

Teesdale appealed.

The appeal motion came on in May, 1872, when it was found that the infant Plaintiffs in *Woodbridge* v. *Teesdale* were not parties to the administration suit, nor bound by the proceedings in it. The Court therefore ordered the motion to stand over, with liberty to apply to have it restored to the paper. Proceedings were then taken to make the infants parties to the proceedings, and after much litigation the cause was heard on further considera-

(1) 20 W. R. 520.

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tion, and the infants declared bound by the accounts taken in the suit. The appeal motion was now brought on again.

Argument.

Macnaghten, for the Appellant:—

The Appellant has been decided to have been free from blame. These costs have been incurred by him as trustee of the will, and he is entitled to be indemnified against them out of the estate: *D'Oechsner* v. *Scott* (1); *Benett* v. *Wyndham* (2).

Southgate, Q.C., and *Chapman Barber*, for the Plaintiff:—

The suit of *Woodbridge* v. *Teesdale* was a personal attack upon the trustee, and in defending it he was not defending the estate but himself. He defended it without leave, which was refused, because he was not thereby defending the estate.

[JESSEL, M.R.:—The refusal of leave proves nothing. Lord *Romilly* could not give him leave to defend, and have his costs out of the estate, because for anything that could then be known the charges of misconduct might all have been true.]

Parker v. *Watkins* (3) is in our favour.

[JESSEL, M.R.:—That case is obviously distinguishable. A mortgagee who defends a suit impeaching his security is only acting on behalf of himself; he is not defending the interests of anybody else.]

Dunning, for other parties.

Job Bradford, for the Plaintiffs in *Woodbridge* v. *Teesdale*:—

This proceeding is irregular. The matter should have been left to be disposed of under the ordinary direction to give the trustees their costs, charges, and expenses properly incurred: *Graham* v. *Wickham* (4).

Judgment, Jessel, M.R.

JESSEL, M.R.:—

I do not mean to say that separate applications by summons as to the allowance of costs, charges, and expenses are in all cases proper, but where there is a special case, which, as all parties know, must be argued before the Court at some time or other, it is not

(1) 24 Beav. 239.
(2) 4 D. F. & J. 259.
(3) Joh. 133.
(4) 2 D. J. & S. 497.

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unusual to give special directions about it. Though the costs can be obtained under the common form of order, giving the trustees their costs, charges, and expenses properly incurred, directions are often given about them after a discussion before the Court in the first instance. This course frequently saves the expense of an argument before the Taxing Master, and an appeal from his decision. I cannot therefore say that it was irregular for this summons to be taken out. The cause had been heard on further consideration, and there was no prospect of any speedy further hearing. Under these circumstances the trustee was not bound to wait, especially as there was a case which called for argument, and which appears to me one to render the course of proceeding which has been adopted perfectly proper.

Then, as regards the merits, the suit of *Woodbridge* v. *Teesdale* was in substance a step towards impeaching a compromise which has been decided to be a compromise beneficial to the estate. It was in form a suit to impeach the decree sanctioning that compromise—a decree without which that compromise could not have been carried out, since it was requisite to bind persons under disability. A decree, therefore, setting aside the decree in *Woodbridge* v. *Woodbridge* would have gone a long way towards doing away with the compromise. It is true that the bill in *Woodbridge* v. *Teesdale* proceeds on the ground of personal fraud imputed to one of the trustees in obtaining the decree; but whatever the ground was on which the decree was impeached, the suit was defended by the trustee, not on his own behalf, but simply as trustee. It seems to me, therefore, to come within the principle that where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity. Here the defence by the trustee was for the benefit of the trust estate; it is true that at the same time he defended his own character, but that was merely an incident. If he had died, and his co-trustees had defended the action, they must at the same time have defended him. The defence of his character, therefore, does not make the defence less a defence on behalf of the trust estate, and there is no reason why he should be left to bear his

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own costs. The principle that a trustee shall not make any profit from his office is rigidly enforced by the Court, and the principle that while he acts in the due discharge of his duty he is to be indemnified against all loss ought to be enforced with equal strictness.

Judgment, Jessel, M.R.

It has been urged that the Appellant ought not to have a separate set of costs for appearing alone. But the case is one in which severance was clearly justified. Personal charges of fraud were made against him, and this justified the other trustees in declining to join with him.

Then it was urged that the suit was a suit by persons entitled only to one share of the residue. We are not deciding anything as between the owners of the different shares. We only decide that Mr. *Teesdale* is entitled to be indemnified out of the estate, not whether his costs ought, as between the owners of the different shares, to be thrown on one share rather than another.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord *Romilly* says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion.

Solicitors: *Merediths, Roberts, & Mills; Lewin; Rooks & Co.; Young, Maples, & Co.*

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Ex parte DELHASSE. *In re* MEGEVAND.

C. A. 1877 V.-C. B. *Nov.* 5. C. A. 1878 *Jan.* 17, 24.

Partnership—Loan—Participation in Profit and Loss—Partnership Law Amendment Act (Bovill's Act, 28 & 29 Vict. c. 86), s. 1.

Though an agreement is expressed to be an agreement for a loan to a partnership under sect. 1 of *Bovill's Act*, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the Act and the declaration, is to give him the rights and impose on him the obligations of a partner.

The Act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of the business.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Prior and up to the 30th of June, 1869, *Felix Delhasse* carried on business at *Manchester* and at *Bradford* in partnership with *J. G. Schlapffer*, *H. Notz*, and *F. Megevand*, as merchants, under the firm of *H. D'Hauregard & Co.* This partnership was dissolved as from the 30th of June, 1869, and the dissolution was gazetted and all proper notices given.

On the 11th of June, 1869, written articles of agreement were entered into between *Megevand* of the first part, *J. J. Schœppi* of the second part, and *Delhasse* of the third part. These articles contained the following recitals:—"Whereas the said *F. Megevand* and *J. J. Schœppi* have agreed to become partners together in the business of *H. D'Hauregard & Co.*, *Bradford*, upon the terms, and subject to the stipulations, conditions, and agreements with each other, and with the said *F. Delhasse*, hereinafter contained;" a recital of the 1st section of the Act 28 & 29 Vict. c. 86; "And whereas, in order to form and carry on the said partnership business, *F. Megevand* and *J. J. Schœppi* have requested the said *F. Delhasse* to lend them the sum of £10,000 for the purpose of investing the same in the said business, which the said *F. Delhasse* has agreed to do upon the terms, and subject to the provisions, stipulations, and agreements in that behalf hereinafter contained."

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Statement.

And it was thereby agreed by and between all the parties thereto as follows:—

1. "The said *F. Megevand* and *J. J. Schœppi* shall be and continue partners together from the 1st of July, 1869, to the 30th of June, 1872.

2. "The partnership shall be carried on under the style and firm of *H. D'Hauregard & Co.* of *Bradford* aforesaid.

3. "The capital of the partnership shall consist of the said sum of £10,000, and of such further sum or sums as may at any time during the continuance of the said partnership be advanced by any of the parties hereto, and which £10,000 and sums respectively shall bear interest at the rate of £5 per cent. per annum.

4. "The said sum of £10,000 is advanced by the said *F. Delhasse* to the said *F. Megevand* and *J. J. Schœppi*, by way of loan under the 1st section of the said Act of Parliament hereinbefore recited, and such advance does not and shall not be considered to render the said *F. Delhasse* a partner in the said business. The said sum of £10,000 is to be paid exclusively from the property belonging to the said *F. Delhasse* and invested in the firm of *Henry D'Hauregard & Co., Manchester*. The two firms in *Manchester* and in *Bradford* shall have to agree between themselves upon the mode of payment of the aforesaid amount, without any interference on the part of Mr. *Delhasse*.

5. "The name of the firm shall be signed only by the said *F. Megevand* or *J. J. Schœppi*.

6. "The expenses arising from the business will include interest on capital, warehouse rent, salaries, and other miscellaneous expenditure.

7. "The books shall be kept by double entry, and an account current to the 30th day of June in each year shall be remitted within three months after that date to each partner, and duly signed. Similar account current to be remitted to Mr. *F. Delhasse*, who shall receive statement of account every three months, and who shall have the privilege to examine the books of the firm at any time.

8. "On the 30th of June in each year an inventory shall be made, and, after having deducted the expenses above mentioned,

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the profit or loss shall be divided in the following proportions, viz., 25 per cent. to Mr. *Delhasse;* 37½ per cent. to Mr. *Megevand;* 37½ per cent. to Mr. *Schœppi.*

9. "That neither of the partners shall be allowed to overdraw his private expenditure account more than £500 per annum, for which he shall be debited in account current.

10. "In case of death of any of the partners, an inventory shall be made six months after such a death, and the executors or administrators of such deceased partner shall be paid his share of the capital and interest due to him in account current, and according to the said last inventory; such reimbursement shall not be due until the expiration of the present contract, and only then in case the business be continued, otherwise it shall not be due until the business is liquidated. In the case last aforesaid the surviving partner shall continue the business until the expiration of the present contract, and divide between himself and Mr. *Delhasse*, and *pro ratâ*, the share which the deceased has had in the business.

11. "In the case of the death of any of the partners the partnership to be dissolved if Mr. *Delhasse* demands it, and in such a case the liquidation of the business, if he shall require it, shall fall to the latter, who may, according to his option, substitute the surviving partner for a consideration to be agreed for.

12. "The partnership shall be dissolved, if Mr. *Delhasse* demands it, in case his original capital of £10,000 shall be reduced by losses to one-half of its amount.

13. "Mr. *Delhasse* shall have the option to substitute any other person into his rights and obligations, and Messrs. *Megevand* and *Schœppi* on their part shall have the same option to substitute Mr. *Delhasse*, by reimbursing him his capital and interest.

14. "In case of death of Mr. *Delhasse*, his heirs, executors, or administrators shall not be allowed to withdraw his or any part of his capital invested in the business of *Henry D'Hauregard & Co.* in *Bradford* until the expiration of the present contract.

15. "If the present contract is not renewed six months before its expiration on the 30th of June, 1872, the partnership shall be dissolved on that date."

This agreement was twice renewed by all the parties to it, first, for a term of three years, terminating on the 30th of June, 1875,

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and then for a term of two years, ending on the 30th of June, 1877.

Statement.

In addition to the £10,000 originally advanced by *Delhasse*, he from time to time advanced further sums for the purposes of the business, amounting to £6000, for which he held acceptances of the firm as security.

On the 7th of September, 1876, *Megevand & Schœppi* filed a liquidation petition, describing themselves as merchants, trading as "*H. D'Hauregard & Co.*" Their creditors passed resolutions for liquidation by arrangement, and appointed *Henry Dickin* trustee. *Delhasse* carried in a proof upon the acceptances for £6717 11*s.* 5*d.*, being the £6000 with interest. The trustee rejected the proof on the ground that upon the true construction of the agreement *Delhasse* was a partner with *Megevand & Schœppi*, and as such could not prove in competition with the creditors of the firm.

On the 15th of May, 1877, an application to the County Court by *Delhasse* that the trustee might be ordered to admit his proof was dismissed with costs.

Delhasse appealed to the Chief Judge. The appeal was heard on the 5th of November, 1877.

Argument.

De Gex, Q.C., and *Smyly*, for the Appellant, cited *Cox* v. *Hickman* (1); *Waugh* v. *Carver* (2); *Mollwo, March, & Co.* v. *Court of Wards* (3); *Ex parte Mills* (4); *Pooley* v. *Driver* (5); *Ex parte Tennant* (6).

Winslow, Q.C., *Ince*, Q.C., and *West*, for the trustee, were not called upon.

Judgment, C. J. B.

BACON, C.J.:—

No doubt at one time it might have been said that the law on the subject had been questioned, but the criticisms which have been passed on the case of *Waugh* v. *Carver* have thrown such light upon it that it is not worth while to go back to the case of participation in profits as the test of partnership, because the case

(1) 8 H. L. C. 268.
(2) 2 H. Bl. 235.
(3) Law Rep. 4 P. C. 419.
(4) Law Rep. 8 Ch. 569.
(5) 5 Ch. D. 458.
(6) 6 Ch. D. 303.

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of *Cox* v. *Hickman* (1) has completely settled the law, and the judgment in that case goes principally on the ground that the relation of principal and agent must be established before the dormant partner, or the person lending his money, can be held to be liable for the debts contracted in the business. The Act of Parliament which is called Lord Chief Justice *Bovill's* Act was passed probably with a view to the then state of the law. But the provisions of that statute are very plain, and are stated in the agreement out of which this contest arises. [His Lordship read sect. 1 of the Act.] Beyond that the statute does not proceed otherwise than to inflict upon the lender a penalty by postponing the payment of his debt to the debts due to creditors of the other partners. In this case it appears that a partnership existed at *Manchester* and at *Bradford*, in which Mr. *Delhasse* was a partner. That partnership was dissolved, and a new partnership was constituted at *Bradford* between the present bankrupts, *Megevand & Schœppi*, and then, in order to enable them to carry on their business, Mr. *Delhasse* agreed to lend them £10,000, and he proposed to protect himself by the stipulations of this agreement and by reference to the statute, which he considered would prevent his being a partner in the concern. Accordingly in the bankruptcy which has happened he does not seek to prove for that £10,000, but he says that after the agreement was executed and the business commenced he lent them other moneys, that is to say, he became liable to pay, and did pay, for them other sums of money which were used for the purpose of carrying on the business of the partnership. It is not by mere reference to the statute, and by expressing an intention that a lender shall have the benefit of the statute, that the application of the general law can be excluded. If so it would only be necessary for a man to contract in writing to lend £5 and then afterwards to lend other sums of money, and bring them in and say, If bankruptcy happens I shall not forfeit the £10,000, as in this case, or any other sum, but I only forfeit or have postponed the £5 or other sum which I lent in the first instance, because I said I lent it under the Act of Parliament. In this case, as in all others, the intention of the parties must be collected from the instrument to which they are parties, and all the sur-

(1) 8 H. L. C. 268.

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rounding circumstances must be considered. As I read this agreement it is, in my view of the case, a very plain contract for a partnership by participation in profits between the three persons who are parties to it. The large share of prospective profits is the inducement to Mr. *Delhasse* to lend his money and join those persons, the persons to whom he lent it undertaking that he shall have a large share of the profits of the business they were carrying on by means of the money which he lends them. It was in the course of things that more money might be required, and that that money should become part of the capital of the concern. The agreement is that the borrowers request *Delhasse* to lend them £10,000 for the purpose of investing the same in the business, which he has agreed to do upon the terms and subject to the provisions afterwards therein contained. A great part of the argument was founded upon considerations drawn from the case of *Pooley* v. *Driver* (1), and that case is sought to be distinguished from the present, on the ground that there the lender had some specific right to some part of the property of the business, and might have applied for an injunction to prevent the misappropriation of any part of the capital which he had so lent. That is so in this case. The contract is that the £10,000 shall be invested in the business, not lent to the partners, for the purpose of carrying it on, and it is in fact the capital of the business, and yet it is said that no injunction could in the present case be granted, even if the partners had taken that £10,000 and invested it in shipping or other transactions foreign to the business. I cannot follow that argument. The advance is made, according to the recitals in the agreement, for the express purpose of carrying on the business of the partnership, and is to be subject to all the stipulations in the agreement. [His Lordship, after referring to the second and third articles of the agreement, stated:—] Then the agreement goes on to provide that if at any time during the continuance of the partnership money should be advanced beyond the £10,000, it should be equally applicable to the business. As a matter of fact, Mr. *Delhasse* did advance £6717 in addition. It became by the very terms of this agreement a part of the capital of the business, and can it be said that *Delhasse* would not

(1) 5 Ch. D. 458.

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have had the right, if he found either that his £10,000 originally invested, or any sum added to it since by way of loan, was being applied for other purposes than those contemplated by the agreement, to restrain them? I have no hesitation in saying that if that money had been appropriated to anything else but the carrying on of the business, Mr. *Delhasse* would have had a right to apply to the Court to restrain the partners from so misapplying it. Then the stipulation in the 7th clause is that Mr. *Delhasse* shall receive a statement of accounts every three months shewing the way in which every sum has been used and dealt with. That was evidently for the purpose of enabling him to exercise an option, and to say whether he was or was not satisfied with the mode in which his £10,000 was being dealt with. In my opinion, no plainer stipulation constituting him a partner as between himself and the other two gentlemen could have been devised. The agreement further provides that annually an inventory shall be made, and that the profit or loss shall be divided, and that the profit having been ascertained, Mr. *Delhasse* is to have 25 per cent., not only on his £10,000, but upon the whole profits made by the firm. An inventory is also to be made on the death of any of the partners within six months after their decease, and the executor is to be paid the deceased partner's share of the capital and interest in the concern, according to the statement shewn in the inventory; it being provided that in the last event the surviving partner shall continue in the business until the completion of the contract, and that then an account shall be taken, and the proceeds of the business shall be divided between Mr. *Delhasse* and the surviving partner. How they can contend that that is not a stipulation for a partnership all the time that the business is carried on, and for a partnership share in the division of the property when the business comes to an end, I am at a loss to conceive. But the agreement goes even further, because it gives to Mr. *Delhasse* the power, in the event of the death of one of the partners, or in the event of the original capital of £10,000 being reduced by losses to one-half, to dissolve the partnership and to liquidate its affairs; and yet the gentleman to whom that right is reserved is said not to be a partner, because he says under the *Partnership Amendment Act* he has lent the £10,000

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to the firm. If that was enough the Act of Parliament would be a cobweb, to be broken through by the most clumsy contrivances, or by such a device as is here resorted to.

Without going into the cases that have been referred to, all of which were elaborately considered by the Master of the Rolls in *Pooley* v. *Driver* (1), I am of opinion that the agreement in that case and the present are for all practical purposes substantially identical. The object in each of them was, by means of Lord Chief Justice *Bovill's* Act, to secure all the benefits which a partner could derive from the business to be carried on, and at the same time to evade the liabilities which the law casts upon persons who participate in the profits of a partnership, whether dormant partners or active. The only exception that that Act made in favour of persons who made such advances to a partnership on the condition of participation in the profits by way of interest, and at the same time declared that the money they advanced was a mere loan to the partnership, was that they could prove for it, but only after every one of the other creditors had been paid. In my opinion the case is identical with *Pooley* v. *Driver*, in which the Master of the Rolls, speaking of the advance, says (2): "Therefore, although they call it a 'loan,' and although I agree that, standing alone, the fact of the duration of the loan being the duration of the partnership might not of itself be conclusive, it all tends in the same way to shew that this was really intended as an advance of capital to the partnership business, made for the purpose of carrying it on, and not as an ordinary loan." The concluding observations of the Master of the Rolls are these. Having examined the articles of partnership, he says, "These are the documents on which I am called upon to decide, and I must say that I have come to a clear conclusion that this is not a transaction of loan within the meaning of the Act of Parliament, that the true relation of the parties towards one another was that of dormant and active partners, and not of mere creditors and debtors; that in this case I need not rely on one provision, or on two provisions, but on the whole character of the transaction from beginning to end. It is an elaborate device, an ingenious contrivance for giving these contributors the whole of the advantages of

(1) 5 Ch. D. 458. (2) 5 Ch. D. 490, 493.

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the partnership without subjecting them, as they thought, to any of the liabilities. I think the device fails, and that, looking at the law as it stands, I must hold that they are partners and liable to the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts." It is not necessary for me in this case to go that length. The earlier part of the judgment of the Master of the Rolls, this being a question of proof in bankruptcy, I adopt entirely. Although I am not bound by the decision of the Master of the Rolls, I feel myself bound to adopt the reasons and principles which are there enunciated. I think the principle is plain. In this case there is a plain contract that with the £10,000 which Mr. *Delhasse* gave the traders first, and with such sums as he has given them since, they should carry on a trade for his benefit, out of which he should, at all events, have 25 per cent. in addition to the ordinary rate of 5 per cent. upon the sums which he had from time to time advanced. In my opinion Mr. *Delhasse* was a partner dormant, if not active, and not a mere creditor. Therefore the judgment of the learned Judge of the County Court is entirely applicable to the case, and this appeal must be dismissed with costs.

C. A.

From this decision *Delhasse* appealed. The appeal was heard on the 17th and 24th of January, 1878.

Argument.

De Gex, Q.C., *Herschell*, Q.C., and *McKeand*, for the Appellant:—

According to the true construction of the agreement the Appellant was not a partner, and therefore he is entitled to prove in competition with the creditors for the advances he made beyond the £10,000, those advances having been made, as we say, *dehors* the agreement: *Ex parte Mills* (1).

The main question, therefore, is whether the Appellant was a partner. Independently of the Act 28 & 29 Vict. c. 86, s. 1 (2),

(1) Law Rep. 8 Ch. 569.

(2) Sect. 1: "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

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when two persons entered into an agreement and said expressly we are not partners, could any creditor have a right to say, "You are nevertheless partners"? The Appellant was never held out as a partner, and no creditor of the firm knew anything about him. *Waugh* v. *Carver* (1), and cases of that class, have been superseded by the decision of the House of Lords in *Cox* v. *Hickman* (2). Of course if the ostensible trader was the agent of the real secret trader, there would be a repugnancy in the agreement, and the latter could be sued as a partner. But that is not the present case. The principle of *Waugh* v. *Carver*, that he who takes the benefit must also take the burden, is now exploded. The law is settled by *Cox* v. *Hickman*. It was said there that it must be shewn that the ostensible trader was acting as the agent of a principal who was the real trader. This would have been quite clear but for some of the observations of *Jessel*, M.R., in *Pooley* v. *Driver* (3). From an agreement to share in the profits it may be inferred that the one was the agent of the other, unless there is something in the contract to control this, something to shew that this was not the real intention. This is clearly expressed in the judgment of *Bramwell*, B., in *Bullen* v. *Sharp* (4). The Appellant had no control over the expenditure of the £10,000; the other parties could spend it in any way they pleased; he could not have obtained an injunction or a receiver. His only right was to see the books. *Pooley* v. *Driver* was quite a different case; there was a provision there that the money should remain in the business during its continuance. There is no such provision in the present case, it is a simple loan. Sharing the losses is not of itself sufficient to make a man a partner any more than sharing the profits. In *Mollwo, March, & Co.* v. *Court of Wards* (5) the Rajah had full control over the business, and yet it was held that he was not a partner. The real test of partnership is agency: *Re English and Irish, &c., Assurance Society* (6). The judgment of Lord Justice *James* in *Ex parte Tennant* (7) lays down the law somewhat differently from that of the Master of the Rolls in *Pooley* v. *Driver*.

(1) 2 H. Bl. 235.
(2) 8 H. L. C. 268.
(3) 5 Ch. D. 458, 476.
(4) Law Rep. 1 C. P. 86, 125.
(5) Ibid. 4 P. C. 419.
(6) 1 H. & M. 85, 106.
(7) 6 Ch. D. 303, 309.

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The Respondent says that a partnership ought to be inferred because the agreement contains provisions such as would be found in a partnership deed. The parties, however, have said, We do not intend to be partners. No doubt, in spite of this, they would be partners if the Court could see there was a mere device to obtain the benefit while avoiding the responsibility of a partnership. But the deed ought to be construed so as to carry out as far as possible the intention of the parties, and it lies on the Respondent to shew that, *ex necessitate rei*, a partnership was constituted. There is no question about holding out.

[BAGGALLAY, L.J. :—Is there anything in the present case to negative the notion of a partnership, except the recitals of the Act and the declaration that there is no intention to constitute a partnership ?]

There is more than that. If the view of the Master of the Rolls in *Pooley* v. *Driver* (1) is right, the Act puts a man who lends money to a trader on condition of receiving a share of the profits in a worse position than he was before, because the Master of the Rolls says that the Act does not apply until you have shewn that there is no partnership. When a man expressly says, I don't intend to be a partner, are the ordinary rights of a partner to be implied in his favour? For the case must be decided just as it would be if the Appellant was claiming the rights of a partner. The test which the Master of the Rolls puts in *Pooley* v. *Driver* (2), of a dormant partner, is fallacious, for a dormant partner is liable to the creditors, because he has agreed to be a partner. He has deprived himself of certain rights which *primâ facie* he would have as a partner; whereas, in a case like the present, it is sought to give a man rights which *primâ facie* he has not. In *Bullen* v. *Sharp* (3) losses were to be shared as well as profits, but it was held that there was not a partnership. Sharing profits and losses would, no doubt, if it stood alone, constitute a partnership; that would be the legal inference. The inference may, however, be rebutted, and there is enough to rebut it in the present case. There is nothing unfair in endeavouring to obtain the benefit of a partnership while escaping its liabilities, if it can be done consisently with the

(1) 5 Ch. D. 458. (2) 5 Ch. D. 476, 477.
(3) Law Rep. 1 C. P. 86.

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law. Clause 13 of the agreement shews that the Appellant could have been paid off at any time.

[JAMES, L.J.:—The essence of the judgment in *Pooley* v. *Driver* (1) seems to be that if the party, who is said not to be a partner, intended to exercise a control over the application of the money which he advanced, and could have brought an action in respect of its application, then it was intended that he should be a partner.]

No such control is reserved in the present case. The intention clearly was that the Appellant should not be a partner, and there is nothing in the agreement necessarily inconsistent with that.

Winslow, Q.C., *Ince*, Q.C., and *West*, for the trustee:—

The argument comes to this, that the Court is to look only at the declaration in the agreement that the parties are not to be partners, and is to disregard all the other provisions, and to give the Appellant the protection of the Act.

[JAMES, L.J.:—It is said that, independently of the Act, there would not be a partnership.]

If the legal result of the agreement is a partnership, it does not signify what the parties call themselves. They cannot evade their legal liability by saying they are not partners. What is a partnership? A number of definitions have been given. *Vice* v. *Lady Anson* (2) and *Green* v. *Beesley* (3) are illustrations of the principle. Mr. Justice *Lindley* says (4): "The writer is not aware of any case in which persons who have agreed to share profit and loss have been held not to be partners." Each partner becomes by law the agent of the others for all the purposes of the business. Mr. Justice *Lindley* adds (5): "The inference that where there is community of profit there is a partnership, is so strong, that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist." *Cox* v. *Hickman* (6) is not inconsistent with this view. The question, as Lord *Cranworth* said (7), is whether the trade has been carried on on behalf of the alleged partner.

(1) 5 Ch. D. 458.
(2) 7 B. & C. 409.
(3) 2 Bing. N. C. 108.
(4) Lind. Partnership, 3rd. Ed. p. 19.
(5) Ibid. p. 23.
(6) 8 H. L. C. 268.
(7) 8 H. L. C. 306.

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[JAMES, L.J.:—Could *Delhasse* have pledged the credit of the firm?]

There might be a partnership, even if the agreement was that one partner should carry on the business as he in his uncontrolled discretion thought fit, and that the other should have no power to interfere. But here, with the exception of the reference to *Bovill's Act*, and the declaration that there is not to be a partnership, all the provisions of the agreement point to a partnership. On the dissolution of the old firm, *Delhasse*, who was known to be the partner who had the capital, withdrew, leaving all his capital in it on the terms of this agreement; it was clearly a device to evade the responsibility of a partner. In *Ex parte Tennant* (1) the father's liability for losses was simply as a security for the son, as Lord Justice *Cotton* points out (2), whereas here the liability for losses arises out of the contract between the parties. And Lord Justice *Cotton* says (3), "The way in which the profit is to be participated in is really the essence of the whole matter. If the business is carried on by one man as agent for another as principal, the mere fact that he carries it on for another gives that other whose agent he is the right, from his position of principal, either to the whole or to a share of the profits." The effect of the agreement in this case is to make the other two agents for *Delhasse*. The right to a share in the profits is given to him, not *quâ* debt, as in *Ex parte Tennant*, but *quâ* profits. Whether it is a case under *Bovill's Act* or not, it is essential to the notion of a loan that the lender should be able at some time or other to sue the borrower. There is no such right here. *Delhasse* could never have brought an action against the other two for his £10,000. His only right would have been to have the partnership accounts taken, to have the business wound up and the debts paid, and then to have his £10,000 paid out of the remaining assets. *Megevand* and *Schœppi* were under no personal liability to repay it. The agreement is really that the business shall be carried on by the two on behalf of the three. *Syers* v. *Syers* (4) is another illustration of the principles applicable, and *Mollwo, March, & Co.* v. *Court*

(1) 6 Ch. D. 303.
(2) Ibid. 314, 315.
(3) 6 Ch. D. 316.
(4) 1 App. Cas. 174.

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of Wards (1) assists our argument. There, in delivering judgment, the Court said (2), "Whenever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract." In *Ex parte Mills* (3), Lord Justice *Mellish* expressed an opinion that if an advance was made under the Act, with an agreement for a share of profits, and further sums were advanced without any such agreement, with an intention to elude the Act, the lender would be a partner. The agreement in the present case is an attempt to evade the law. In *Stocker* v. *Brocklebank* (4) there are *dicta* in our favour. The agreement to share profit and loss makes it clear that there was a partnership, whatever the parties have said.

Herschell, in reply:—

Sharing profit and loss does not necessarily constitute a partnership. There is no such rigid rule contrary to the intention of the parties. The rule formerly was that sharing in profits constituted a partnership, but that is exploded since *Cox* v. *Hickman* (5). A lender of money to a firm may make stipulations for his own protection without becoming liable as a partner.

[THESIGER, L.J.:—Does not an advance by way of loan imply a personal liability to repay?]

A father might advance money to a son engaged in business as a gift, without becoming a partner. It is not enough to shew that the provisions of the agreement are consistent with the existence of a partnership; it must be shewn that they cannot be carried out without a partnership. Some of the stipulations in the agreement would be very unusual in the case of a partnership, *e.g.*, the power given to *Delhasse* to make a stranger a partner without consulting his co-partners. The case must be viewed just as it would be if *Delhasse* were now insisting that he was a partner. He may have agreed to surrender some of the ordinary rights of a lender, but that does not make him a partner. It would be extra-

(1) Law Rep. 4 P. C. 419.
(2) Ibid. 435.
(3) Law Rep. 8 Ch. 569.
(4) 3 Mac. & G. 250, 260.
(5) 8 H. L. C. 268.

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ordinary if the partner who found all the money could be turned out as soon as the business became profitable.

JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge, affirming the decision of the County Court Judge, ought to be affirmed by this Court.

No doubt the question is, what is the true intent and meaning of the contract between the parties, and what is the true legal effect of the real transaction between them, which must be gathered from the whole instrument and not from a few words in it which may have been inserted for some purpose or other. Every word ought to have its weight and ought to be well considered.

Now, in construing this contract, I will consider it first as it would have stood, omitting those two or three clauses upon which the principal reliance has been placed by the counsel for the Appellant. [His Lordship read the whole of the agreement, except the recitals of the 1st section of the Act, and of the agreement for the loan of the £10,000, and clause 4, and continued:—]

Now, if that had been the agreement, could there be any doubt whatever what the relation between the parties was, namely, that *Megevand* and *Schœppi* were active partners, each of them having the power of signing the name of the firm, and that *Delhasse* was the dormant moneyed partner who was to have all the rights which a dormant moneyed partner would have in respect of the capital of the business? He would have had no right to interfere in the ordinary management of the business, but so far as regards keeping the capital in the firm and preventing its being applied to any other purpose, and preventing the name of the firm from being pledged in any other than its legitimate business, *Delhasse* would have had every power that the other partners had. He would have had the power of preventing them from contracting debts except for the firm, and he would have been entitled to have the capital in his hands in case of the death of either of the ostensible partners. The property would have been the property of the firm, and *Delhasse* would have had the power of seeing that the assets were properly applied in discharge of the liabilities, and the right to take possession of

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the whole thing and to apply the assets in payment of the debts of the firm, and he would have been entitled to share in the interest of the deceased partner if he was minded to continue the business. He takes a share of the profits, and he is to bear his share of the losses. If ever there was a case of partnership this is it. There is every element of partnership in it. There is the right to control the property, the right to receive profits, and the liability to share in losses.

But it is said that there are other provisions in the contract which prevent its having this operation, and which shew clearly that the parties meant the relation of lender and borrower, and not the relation of partners, to subsist between them. And for that purpose reliance is placed on the recital of sect. 1 of the Act—the recital of the agreement for a loan—and the declaration in clause 4, that "the £10,000 is advanced by *Delhasse* to the other two by way of loan under that section, and such advance does not and shall not be considered to render *Delhasse* a partner in the business." Can those words really control the rest of the agreement? Do they really shew that the intention was not in truth that which it appears to be by all the other stipulations? To my mind it is quite clear that they do not. When you come to look at all the other stipulations, they are utterly inconsistent with the notion of a loan by the one to the two, so as to make the two personally liable in respect of it in any event or under any circumstances whatever. The loan is said to be made to the two, but, when you read the whole of the agreement together, it is impossible not to see that it was not a loan to the two upon their personal responsibility by the person who is said to be the lender, but that it was a loan to the business which was to be carried on by the two for the benefit of themselves and him, and was to be repaid out of the business, and out of the business only, except in the case of loss, when the loss would have to be borne by the three in the proportions mentioned in the agreement. The use of the word "lend," and the reference to the Act, are, in my opinion, a mere sham—a mere contrivance to evade the law of partnership. The loan is a mere pretence, the object being to enable the so-called lender to be, not only a dormant partner, but the real and substantial owner of the business, for whom and

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on whose behalf it is to be carried on, and yet to provide that he shall not be liable for the loss, in case loss shall be incurred. In my view, it is the same thing as if *B.* were to set up a business to be carried on by *A.*, he being nothing but a manager, *B.* being the real principal, although *A.* was buying and selling everything, and then, when the public found out who the principal was, when the thing came to an end, he could say, *A.* is the man you trusted. I was the real principal, but I am not liable to you, although the whole thing was mine from beginning to end. The law of *England* does not allow this to be done, and it appears to me that it equally does not allow a man to escape liability, who, though he is not the entire owner, yet is the substantial owner of a business, but takes in two persons as nominal partners to carry on the business, while in truth it is his business during the whole time. In my opinion this business was really *Delhasse's* business. No doubt the other two were receiving a large share of the profits, but they were receiving that share merely for the purpose of paying them for their management of the business, he being the person whose capital was to produce the profits. He was the person who was to bring in further capital if he thought fit to do so, as he in fact did, for although he did it by putting his name to bills of exchange, yet the money obtained by the discount of those bills of exchange went into the assets of the firm, and formed part of the capital out of which the profits would have been made, if the business had been a profitable one.

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In my opinion, the mere insertion of the provisions, that the £10,000 shall be a loan under the statute, a loan by the one to the other two, and that there shall not be a partnership, cannot alter the real nature of the transaction, which had not the characteristics of a loan by the one to the other two. It was a loan to the business, and that business was carried on at the risk and for the benefit of *Delhasse*, as well as of the others, and I am of opinion that the agreement was in truth and in substance an agreement for a real partnership between all the parties.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am of the same opinion.

As regards the effect of the agreement, I so entirely concur in

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the observations which were made by the Judge of the County Court upon the original hearing, that I do not propose to travel through the various clauses.

It appears to me beyond all question that *Delhasse* was constituted a partner by the agreement, unless the reference to *Bovill's Act* and the provisions of clause 4 make any difference. I think that that reference and those provisions are not sufficient to exclude a partnership if, upon the true construction of the agreement apart from them, a partnership would be established.

Now, in the first place, however much the parties may have intended it, I cannot consider that this was a loan within the provisions of the Act, and for this reason: the Act expressly provides only for a case in which the loan is made "to a person engaged or about to engage in any trade or undertaking." And, according to my view of the agreement in this case, this was not a loan made to the two ostensible partners, but a loan made to the business. It was made by *Delhasse* to himself as well as to the two partners, and this imposed on him, as on them, an equal obligation of bearing any loss in respect of it.

I asked Mr. *Herschell* in the course of the argument whether, in the event of one half of the £10,000 having been lost in the course of the business, and of Mr. *Delhasse* then availing himself of the option to dissolve the partnership, it could be considered a loan of £5000 or £10,000 due to him from the other two partners, or as a loan due to him from the business, and he could not sustain a claim for the whole £10,000 against the other two. It is perfectly clear that *Delhasse* would have had no right to more than that portion of the £10,000 which had not been lost in the carrying on of the business, and I think this view is confirmed by the 3rd clause of the agreement. The £10,000 is there treated, not as a loan to the two partners, but as a portion of the capital of the business, the risk of losing which, as well as the chance of profit, *Delhasse* was to bear as well as the other two partners.

I quite assent to the proposition of Mr. *Herschell*, that one fair way of trying this question would have been this—to see whether, if *Delhasse* had chosen to assert the rights of a partner, he could have been prevented from so doing by either of the other parties. It appears to me clear that he is not deprived of

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any of the rights of a partner, except that of signing the name of the firm, and that he would be perfectly entitled to assert those rights against the other two.

THESIGER, L.J.:—

I am of the same opinion.

In arriving at a conclusion in this case, which is one of importance, I have endeavoured to look first at the position of the parties apart from any consideration of the Act of 1865, and then to see whether there is anything in that Act which makes any difference in their position.

Now, apart from the Act, the law applicable to the case has been laid down in tolerably distinct terms by the House of Lords in *Cox* v. *Hickman* (1), and it is perfectly true that the House of Lords in that case laid it down that the proposition that a participation in profits constitutes an invariable test of partnership is not one which can be maintained. Lord *Cranworth* (2) gives as the test that which, no doubt, must now be taken as the proper test to be applied in all these cases, namely, that the real ground of liability as a partner is that the trade has been carried on by persons acting on behalf of the person whom it is attempted to make liable as a partner. But, in the very same page in which those words occur, Lord *Cranworth* also says that the participation in profits is in general a sufficiently accurate test, and that the right of participation in profits affords cogent, often conclusive, evidence of a partnership. If that be so, it follows as a logical consequence that if, in addition to participation in profits, the arrangement provides for a participation in losses, and also contains stipulations tantamount to the ordinary stipulations which one would expect to find in the case of a dormant partner, it is an *à fortiori* reasoning in such a case in favour of a partnership, and Lord *Cranworth's* words "cogent and often conclusive" must be changed into the words "still more cogent and often more conclusive evidence of such a partnership."

Now, is not that the real state of things under this agreement? The £10,000 is put into the business. I use the expression advisedly, because the £10,000 is treated under clause 3 not merely

(1) 8 H. L. C. 268. (2) 8 H. L. C. 306.

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as a sum in respect of which interest at the rate of £5 per cent. is to be paid to the person who brings it in, but as the capital of the partnership which, equally with other capital which may be brought into the partnership from time to time, is to bear interest in the ordinary way of capital brought by partners into a business.

Then we find a variety of stipulations as to the mode in which the expenses are to be treated in order to arrive at the profits, the books which are to be kept, and the accounts which are to be furnished to *Delhasse* as well as to the two ostensible partners, all being stipulations such as are ordinarily found in arrangements between ostensible and dormant partners.

Then comes clause 8, which, it must be observed, provides, not merely for a payment to the person who is said to have made an advance of money by way of loan of a share of the profits up to some limited extent, which might be supposed to be a fair remuneration for his risk, but for a payment of an indefinite share of the profits. And I observe that Mr. Justice *Lindley*, in his book on Partnership, in speaking of the different propositions which may be deduced from the decision in *Cox* v. *Hickman*, says, among other things (1), "that *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent." That appears to me to be an accurate expression of the law as evolved from *Cox* v. *Hickman* (2). But in this case the agreement does not even rest there, because we find that it goes on to stipulate that *Delhasse* shall have rights even greater than those which an ordinary dormant partner would have, for, in the event of the death of one of the ostensible partners, the surviving ostensible partner is not to have the control of the liquidation of the business; *Delhasse* is to have the control of the liquidation, and he and he alone is to decide whether the business is to be continued. And, finally, instead of any personal liability attaching to the partners in respect of the payment of the sum which is supposed to be advanced by *Delhasse*, there is only a stipulation that, in the event of the contract not being renewed, *i. e.*, the contract between the three, then the partnership is to be dissolved. The assets would then be got in, the accounts would be taken, and the whole

(1) 3rd Ed. p. 45. (2) 8 H. L. C. 268.

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of the £10,000, or, if a portion of it had been lost, only that portion which remained would be paid to *Delhasse*.

It therefore seems to me that, apart from *Bovill's Act*, it is impossible that words could have been used more strongly importing a partnership, or more clearly creating all the rights and obligations which attach to the relation of ostensible and dormant partners. There is only one clause which seems in any way to tend against that conclusion, namely, clause 13, under which the ostensible partners have a right "to substitute *Delhasse* by reimbursing him his capital and interest." I quite agree that to some extent that does tell against the notion of a partnership, and of *Delhasse* having the chief control of the business, but, on the other hand, it is consistent with a partnership, and is, in my opinion, insufficient to override all the other stipulations to which I have referred.

Then the question arises, is there any distinction, so far as this case is concerned, between the position of the parties under the Act and that which they would have held apart from the Act? Now it certainly appears to me a little difficult to discover what is the exact benefit which the Act proposed to give to persons advancing their money to partnerships. At the same time I think one can see that, to a certain extent, there might be some benefit obtained from the Act, for apart from it, as is stated by Mr. Justice *Lindley* in the passage to which I have just referred, the sharing of profits to an indefinite extent might *per se* constitute a partnership, for I take that to be the meaning of "*primâ facie* constituting the relation of principal and agent." Under the Act that would not be so, because it provides that "the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from the carrying on of such trade or undertaking, shall not of itself constitute the lender a partner;" and by the use of the term "a share of the profits," must be intended a share to an indefinite extent. But, on the other hand, the overriding words are "the advance of money," and not merely the advance of money, but "the advance of money by way of loan;" and I suggested to Mr. *Herschell* during the argument whether those words must not be taken to

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import a personal liability, and I did not understand him to dispute that they must. The only answer that he gave was this, that, although that might be the case, yet a gift of money by a father to a son for the purpose of his carrying on a business, and upon a contract to the effect of that referred to in the Act, would not necessarily constitute a partnership. That is perfectly true, but it is equally true that such a gift would not come within the terms of the Act at all, because it only provides for the advances of money by way of loan, and leaves any question of gift to the general law.

It seems to me, stopping at this point, almost impossible to say that this case is within the Act at all, and, if so, the observations which I have made upon the position of the parties, apart from the Act, apply.

But I think that even if the words "by way of loan" were struck out, still, looking at all the provisions of the agreement, by virtue of which there is a participation not only in the profits but also in the losses, and where there are all the stipulations which are ordinarily found in co-partnerships having dormant and ostensible partners, it would be impossible to hold that a case like this was intended to be brought within the provisions of *Bovill's Act*. That being so, and the provisions of the agreement between the parties being such, a mere statement of intention such as we find in different parts of the instrument cannot take the case out of the general law, which is, that, if in body and substance an agreement is one of partnership, a partnership is constituted with all the ordinary duties and liabilities flowing from it.

JAMES, L.J.:—

The appeal will be dismissed with costs.

Herschell, Q.C., asked for leave to appeal to the House of Lords. He stated that an action had been commenced against *Delhasse* by one of the creditors of the firm for £9000, and was pending before the Master of the Rolls. In that action there would be a right of appeal to the House of Lords without any leave.

Winslow, Q.C.:—The trustee ought to be protected against

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costs. If the decision should be reversed, he might be personally liable for costs.

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JAMES, L.J.:—

I do not think the House of Lords is very likely, under the circumstances, to make the trustee personally pay the costs. Leave to appeal will be given.

Solicitors for Appellant: *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Hilton, Manchester.*

Solicitors for Trustee: *Paterson, Snow, & Bloxam*, agents for *Gardiner & Jeffery, Bradford.*

In re BRITISH FARMERS PURE LINSEED CAKE COMPANY.

C. A. 1878 *Jan.* 16.

Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Fully paid-up Shares—Certificate—Estoppel.*

Shares in a limited company were issued as fully paid-up shares, by virtue of a contract not registered as required by the *Companies Act*, 1867, s. 25. The company issued certificates of these shares as fully paid-up shares. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid-up on the faith of the certificates. The company having been ordered to be wound up, the official liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid:—

Held (reversing the decision of *Hall*, V.C.), that, as against a transferee who took the shares without notice that they had not been paid up in cash, the company was estopped by the certificates from saying they had not been so paid up, and that the official liquidator was in the same position.

Blyth's Case (1) distinguished.

Statement.

IN 1872 *Nicolls* entered into an agreement with *John Bennett* for the sale to him of a piece of land for £2100. Before completion, *Bennett*, in September, 1874, contracted with *W. J. Goulton* for the sale of the land to him for £5000 in cash and £1000 in fully paid-up shares in the *British Farmers Pure Linseed Cake Company, Limited.* This company had been registered in 1872 as a limited

(1) 4 Ch. D. 140.

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company, with £20,000 capital divided into 4000 shares of £5 each. The purchase was completed on the 2nd of November, 1874, when *Nicolls* conveyed the land direct to *Goulton*, and the 200 shares in the company were transferred by *Goulton* to *Nicolls* as a trustee for *Bennett*. *Nicolls* was duly entered on the register of shareholders.

Statement.

Certificates for the shares were issued by the company and delivered to *Bennett*, which stated them to be fully paid up.

On the 7th of April, 1876, an order was made for winding up the company, and *Nicolls* was placed on the list of contributories in respect of these shares. The official liquidator in October, 1877, took out a summons for a call of £5 per share on all the contributories, alleging that nothing had been paid on the shares. *Goulton* deposed that 1100 shares, of which the 200 shares in question formed part, had been allotted to him or his nominees as fully paid-up shares in part payment for a mill which he had sold to the company; but there was no registered contract to satisfy the provisions of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 25. The shares thus issued were entered in the books of the company, and returned to the Registrar of Joint Stock Companies as fully paid-up shares. The affairs of the company had been conducted in the most irregular way, and it was deposed by the official liquidator that it appeared from the books that no cash had been paid on any of the shares. There was, however, nothing to fix either *Bennett* or *Nicolls* with notice of any irregularity, or of the fact that the shares had not been paid up in cash. *Nicolls* opposed the summons, and the case was heard before Vice-Chancellor *Hall* in Chambers. His Lordship ordered *Nicolls* to pay the call, on the ground, as it was stated, that it was incumbent on *Nicolls* before taking the shares to make diligent inquiry whether they were, as they purported to be, fully paid-up shares.

Leave was given to appeal direct from Chambers.

Argument.

Robinson, Q.C., and *Byrne*, for the Appellant:—

If this decision is upheld, shares in limited companies will become unmarketable. A *bonâ fide* purchaser for value is surely absolved from all further liability if he has an acknowledgment under the seal of the company that the shares are fully paid up.

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If the purchaser here had made inquiries, it is clear that he would have learned nothing; but we say that there was nothing to put him on inquiry, and that he was not bound to inquire. In *Blyth's Case* (1) no certificates had been issued, and there was no representation by the company.

Dickinson, Q.C., and *Millar*, for the official liquidator:—

The 25th section of the Act of 1867 is express.

[JESSEL, M.R.:—That section appears directed at persons who pay for shares otherwise than in cash. It cannot have been intended to throw upon *bonâ fide* purchasers the obligation of shewing that shares have been paid for in money when they have an admission by the company that they are fully paid up.]

We submit that the Vice-Chancellor was right in holding that the purchaser was bound to inquire. If the shares were issued as fully paid up a registered contract should be called for—if not, there should be proof of payment. *Blyth's Case* is in our favour. It will be said that no certificates were issued, but the judgment did not turn on that.

[JAMES, L.J.:—I did not mention the point. I thought it unnecessary; but both the other Judges pointedly referred to the fact that the company had done nothing to mislead the transferee.]

The certificates were made out and the shareholder had a right to them.

[*Pritchard's Case* (2) was also referred to.]

JESSEL, M.R.:—

This company was formed under a contract of some kind or other for the issue of fully paid-up shares. This contract was not registered, and the shares are therefore to be taken as issued without anything having been paid upon them, and on the footing that they were to be paid up in cash. The meaning of the 25th section of the *Companies Act*, 1867, is this, that you are prohibited from contracting that shares issued shall be paid for otherwise than in cash except by a registered contract. When the section says that the shares are to be deemed to have been issued and to be

(1) 4 Ch. D. 140. (2) Law Rep. 8 Ch. 956.

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"held" subject to the payment of the whole amount in cash, of course it means "originally held," for it cannot mean that they are to be held for ever subject to the payment of the whole amount, although nine-tenths may have been paid in cash. To put it in another way, it means that the shares are to be taken to have been issued so as to be subject to the payment of the whole in cash. The shares now in question are to be deemed to have been so issued, because the contract, whether honestly or dishonestly come to, was not registered.

The next question which we have to decide is, whether there is sufficient evidence of payment to bind the company so as to prevent the liquidator from saying that the shares were not paid for in cash. The facts are these: One *Goulton* obtained the shares from the company. He is said to have been a party to the alleged improper act. He bought property of one *Bennett*, who had contracted to buy of *Nicolls*, and he gave him in payment 200 of these shares. The company issued to *Bennett*, who was not a party to the fraud, and who is not even alleged to have had notice of it, share certificates stating that the shares were fully paid up. It appears also, that if *Bennett* had taken the trouble to inquire, he would have found in the return made to the Registrar of Joint Stock Companies that they were returned as paid up in cash. The position of things seems to have been that *Bennett* asked *Nicolls* to become a trustee of the shares, and instead of being registered in the name of *Bennett* they were transferred by *Goulton* to *Nicolls* as trustee for *Bennett*, and registered in the name of *Nicolls* as paid-up shares. Some years afterwards, the company was ordered to be wound up, and the official liquidator has called upon *Nicolls* to pay up the whole amount due upon the shares, upon the ground that nothing had, in fact, been paid upon them, and the Vice-Chancellor decided that the whole amount must be paid.

It appears to me that the statute by no means alters the law as to what is sufficient evidence of payment. It simply makes the shares liable to be paid for in cash as if no contract had ever been made. In other words, it makes an unregistered contract for the issue of fully paid-up shares equivalent to no contract, but it contains nothing to take away the effect of what, before the statute, was sufficient evidence that the shares had been paid for in cash.

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Let us consider for a moment the consequences of any other decision. No person buying shares in the market as paid-up shares would be safe, for he would get nothing more than a certificate to shew they were paid up. He might go to the company and look at the register, and he would find them registered as being paid up. He might, if he liked, go to the Registrar of Joint Stock Companies, and he would find them registered as paid up. He might go further, and inquire of the board of directors, "Are those shares paid up?" The directors might say, "We were not directors at the time; we have no personal knowledge on the subject. They are entered as paid up in cash in our books, and we have no reason to doubt it." After that the winding-up takes place, and then it is said to him, "Please to prove that these shares are paid up." He says, "These are my documents, and I have no other mode of proof." Is not that sufficient evidence? According to the argument it would not be so, and the shareholder would be liable to pay again. Perhaps I am importing more personal knowledge of this subject than I ought, but I know that, as a general rule, companies call for the bankers' receipts to be sent to them before they issue the certificates of paid-up shares. The receipts then are returned to the company, and the shareholder has nothing but the certificate to shew that the shares were paid up. But even if the receipts were not returned, but were kept by the shareholder, he would be no better off according to the argument of the Respondents. Obviously such a construction would destroy the transferable nature of shares altogether, and would be fatal to the real intention of the Act. The other construction leaves things just as they were, with this exception, that the shares shall be treated as payable in cash, and not in goods or services, or the like. When a receipt is given by the company, or a final receipt in the form of a certificate of payment, what more is a *bonâ fide* purchaser to ask for, and what occasion has he to make any further inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me that the company having made that representation by the certificate which is given for the purpose of being used by the vendor as evidence of title, is estopped from saying afterwards that it has not received the money. It does not matter what the form of the

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receipt is, but the certificate under seal is considered the best form of receipt. It appears to me impossible that the company can be allowed to say that the shares were not paid up in due course. The 25th section does not authorize the company to do any such thing, and there is no distinction to be made between the rights of the company as a going concern and the rights of creditors after the winding-up.

Judgment, Jessel, M.R.

Upon these grounds it seems to me that Mr. *Nicolls* is entitled to say, "You are estopped from saying that my predecessor in title has not paid in cash the whole amount of these shares, and therefore I ought not to be put on the list of contributories except as for paid-up shares." I am therefore of opinion that the order for payment made by the Vice-Chancellor cannot be sustained.

James, L.J.

JAMES, L.J.:—

I am entirely of the same opinion. I think that the section to which we have been referred, and which has been so often before the Court, does not in the slightest degree alter the general law of the land as to the effect of the conduct of a representation by companies, or companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them or by the officers to whom they have intrusted the management of their affairs. If a person goes to a company, and finding there the proper officer to give answers, says, "Has such money been paid to you in respect of such and such shares?" and the answer is, "Yes"; then the company is bound by the representation so made. A joint stock company has no statutory immunity from the consequences of its acts and representations. In this case the certificate, upon the faith of which the company got the shareholder to become registered on their books as a shareholder, says, "We have been paid in full." The shareholder says, "I took the transfer, I went and registered that transfer or allowed it to be registered in your books, I allowed my name to appear in your books as a shareholder upon the faith of your representation that the shares were paid up." It is said that if that be so the 25th section is reduced to a nullity, for that all the directors have to do is to go to a law stationer or a printer and get a certificate nicely engraved, which says the shares are fully

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paid up, and then the section is made nugatory, because there is a representation, by which the company is bound, that the shares have been paid up in cash. No doubt that misrepresentation does bind the company as against any person who was not aware that it was an untrue representation and acted on the faith of it. Every person connected with a company who issues a certificate for shares as paid up in money, when the money has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in exactly the same way and to the same extent as if the money had been taken out of the coffers of the company to pay up the shares, or as if, by some fraud of the directors and the officers, receipts had been given for the payment when payment had not been made. If any person is a party to a breach of duty of that kind he can be made answerable in the winding-up for the consequences of that breach of duty. But that cannot affect the position of a person who says to the company, "You made a representation intending it to be acted upon by any person who should purchase those shares; I have changed my position on the faith of that representation, and you are bound, upon every principle of law and equity, to make good that representation upon the faith of which I was induced to act."

Judgment, James, L.J.

THESIGER, L.J.:—

Thesiger, L.J.

I am of the same opinion. It appears to me that sect. 25 is simply dealing with the original character of the shares issued, and not with any questions as to the proof or disproof of payment on such shares, which questions are left to, and are entirely dependent upon, the general law. According to that law, any shareholder whom a liquidator endeavours to make liable as a contributory in respect of unpaid shares, may either shew that the shares have been in fact paid up, or that the company, whom the liquidator represents, have, by their words or by their conduct, estopped themselves from disputing that the shares have been so in fact paid up. Here we find that certificates have been issued expressing upon the face of them that the shares have been paid up, that the certificates have been handed to Mr. *Nicolls*, and upon the faith of the representations so made he has become a shareholder, without any notice that cash had not in fact been paid, and in respect of

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C. A. 1878

In re BRITISH FARMERS PURE LINSEED CAKE COMPANY.

what he has so done he is attempted to be made liable by the liquidator. It seems to me clear that the present case comes within the general law as to estoppel, and that he cannot be made liable.

It was then stated that since the order of the Vice-Chancellor the call had been paid, and the question was raised whether the Court, being only a Court of Appeal, could order it to be returned.

JESSEL, M.R.:—

I am of opinion that we can, by the same order, direct a return of the money paid under the order which we reverse.

JAMES, L.J.:—

The Court of Appeal has original jurisdiction incidental to its duties as a Court of Appeal, and I am of opinion that in rectifying an order it can set aside what has been done under it.

Solicitors: *Bischoff, Bompas, & Bischoff; Guillaume & Sons.*

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POOLEY *v.* BOSANQUET.

M. R.
1877
Dec. 14.

[1876 P. 265.]

Lis pendens—Motion to vacate Registration—30 & 31 Vict. c. 47, s. 2.

Where an action which was registered as a *lis pendens* had been dismissed for want of prosecution, the Court, on a motion made *ex parte* on behalf of the Defendant, under 30 & 31 Vict. c. 47, s. 2, to vacate the registration, made an order *nisi*, the Plaintiffs to shew cause within one week why the order should not be made absolute.

Statement.

IN this case, the Defendant having moved on an affidavit of service for an order dismissing the Plaintiffs' action with costs, under Rules of Court, 1875, Order XXXVI., rule 4a, the Court had made an order accordingly. The action was registered as a *lis pendens*.

Argument.

Stock, for the Defendant, now moved *ex parte* in the matter of the Act 30 & 31 Vict. c. 47, and also of the Act 23 & 24 Vict. c. 115, and in the matter of the above action, for an order that the registration of the action as a *lis pendens* might be vacated. He referred to the case of *Clutton* v. *Lee* (1), in which an opposed

(1) 1876. April 25.

CLUTTON *v.* LEE.

THIS was a motion for judgment under Order XL., rule 11, for an order against the Defendants to vacate the registration as a *lis pendens* of a foreclosure suit of *Lee* v. *Clutton*, in which the present Plaintiff was Defendant, and which had, on the 19th of November, 1875, been dismissed with costs.

The Plaintiffs in *Lee* v. *Clutton* had refused to consent to vacate the registration of that suit on the ground that a year had not elapsed from the date of the decree within which, without special leave, an appeal might be brought.

On the 7th of March, 1876, the present action was brought against the Plaintiffs in the former action as Defendants, under the provisions of 30 & 31 Vict. c. 47, s. 2, and claimed an order for vacating the registration of the former action as a *lis pendens*. The Plaintiff now moved for judgment accordingly.

The Defendants had given notice of appeal in *Lee* v. *Clutton*, but the appeal had not been set down.

Roxburgh, Q.C., and *Maidlow*, in support of the motion.

Morshead, for the Defendant, contended that the proper mode of proceeding under sect. 2 of the Act was not by action, but by petition or motion in Court, or by summons in Chambers.

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M. R. 1877 POOLEY v. BOSANQUET.

motion for a similar object (the bill having been dismissed with costs at the hearing) was ordered to stand over to see whether the Defendant intended to appeal; and he submitted that there was a distinction between that case and the present, where the action had been dismissed for want of prosecution, no appeal being probable, and asked for an order absolute to vacate the registration.

Judgment.

JESSEL, M.R., made an order *nisi*, the Plaintiffs in the action to have one week to shew cause why the order should not be made absolute.

Solicitors: *Mullens & Bosanquet.*

JESSEL, M.R.:—

By sect. 2 of the Act it is provided that "the Court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it." Strictly speaking, after the determination of the *lis pendens* there is no litigation, and therefore no Court, but as it is the same Court before which the litigation took place that is to make the order, the words, "the Court before whom the property sought to be bound is in litigation" must be taken to mean the Court before whom the property "was in litigation." How is the order to be made? In the same way as is usual with other statutory powers, upon an application in the matter of the Act and in the matter of the former suit. It is true that the section goes on to say, "The application to the Court pending the litigation may be in a summary way by petition or motion in Court, or by summons at Chambers," but that does not take away the power of the Court to make an order where the litigation is over. Therefore, assuming the litigation to be at an end, the application might have been made in the matter of the Act and in the matter of the suit. I do not, however, refuse to entertain this action, because wherever an Act authorizes a thing to be done, and does not point out the way in which alone it can be done, an action will lie. In this case the motion will stand over to see whether the Defendants really mean to prosecute their appeal.

The appeal was afterwards prosecuted, and dismissed with costs.

Solicitors for Plaintiff: *Clutton & Haines.*

Solicitors for Defendants: *Lewin & Co.*

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MOORS *v.* MARRIOTT.

M. R.

1878

Jan. 22.

[1876 M. 181.]

Building Society—Default of Secretary—Claim against Estate—Priority over other Creditors—4 & 5 Will. 4, c. 40, s. 12.

Where the secretary of a benefit building society established and certified under 6 & 7 Will. 4, c. 32, and whose rules provided that the secretary's accounts should be regularly presented and audited, had misappropriated the moneys of the society that came into his hands, and died leaving his estate insolvent:—

Held, that under sect. 12 of 4 & 5 Will. 4, c. 40, the building society was entitled to be paid out of the estate the amount of the defalcations in priority to other creditors, and that the want of due diligence on the part of the society in examining the accounts was no bar to the claim.

Statement.

IN this case, in which an order had been made for the administration of the estate of *George Marriott*, deceased, the question which came before the Court on further consideration was whether certain building societies were entitled to be paid their claim on the estate in priority to other creditors.

George Marriott was for some time before and at the time of his death the secretary and manager of the *Portland Mutual Permanent Benefit Building Society No.* 1, and the *Portland Mutual Permanent Benefit Building Society No.* 2. These societies were established and duly certified under 6 & 7 Will. 4, c. 32, for the usual and authorized purposes. By the rules of each of these societies it was provided that the society should meet once at least in every month to transact the general business, when the bank-book should be exhibited by the secretary, and the amount deposited with the treasurer since the last meeting reported by the chairman; that the treasurer should receive the money at each subscription meeting, and on the following day should satisfy the secretary that the same had been paid to the account of the society at the bankers, and should deliver the pass-book containing an acknowledgment of such money to the secretary, which he should produce at the next meeting of the directors; that three directors should be appointed for the purpose of auditing the accounts of the current year of the society, and the annual accounts should be regularly audited, printed, and published under the superintend-

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M. R. 1878 MOORE v. MARRIOTT. Statement.

ence of the directors. By another rule defining the duties of the secretary, the said *George Marriott* was appointed secretary and manager of the society, and he was directed to produce at each monthly meeting the bankers' pass-book for the inspection of the members of the society.

It appeared that *Marriott* had, on his appointment as secretary and manager of the said societies, given a bond as one of the rules required; he was intrusted with the receipt of moneys and the keeping of the accounts of the said societies, and thus received and had in his hands from time to time divers sums of money paid to him by members in respect of their subscriptions, amounting in the whole to £341 10*s.* 9*d.* for the first-named society, and £10 0*s.* 3*d.* for the secondly named society. These sums he had not accounted for, but spent them for his own purposes.

On the 2nd of January, 1876, *Marriott* died, having made his will and appointed the Defendant his executrix; and on taking the accounts the Chief Clerk certified that the said sums were due to the said societies respectively, and that the estate was insufficient to pay his debts in full.

At the time of the testator's death neither of the societies had obtained certificates of incorporation under 37 & 38 Vict. c. 42.

The two societies now claimed payment of the sums so found due to them in priority to the other creditors. They had presented their demand in writing, under sect. 12 of the Act 4 & 5 Will. 4, c. 40, for Amending the Laws relating to Friendly Societies (1).

(1) Sect. 12 of the Act provides as follows: "That if any person already appointed or who may hereafter be appointed to any office in a society established under the said recited Act" (10 Geo. 4, c. 56) "or this Act, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall die or become a bankrupt, or insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands, goods, chattels, or effects, or property or estate, heritable or moveable, or make any assignment, disposition, assignation, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators, or assignees, other persons having legal right, or the sheriff or other officer executing such process, or the party using such action or diligence, shall within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all moneys and other things belonging to such society to such person as such society or committee shall appoint, and

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MARRIOTT.

Chitty, Q.C., and *Carey*, for the Plaintiffs, who were creditors of the testator:— Argument.

The building societies of which the testator was secretary and manager claim against his estate, under sect. 12 of the Act 4 & 5 Will. 4, c. 40, in respect of the moneys which he received but did not account for. We contend that this case does not come within the words of that section which apply to the estate of a person "having in his hands or possession" the money of the society, for here the testator had expended the moneys in his lifetime for his own purposes. Even if the statute does apply to the case of defalcation, the societies ought to have used due diligence in investigating the accounts of their secretary. The rules provide that there should be monthly meetings, when the bank-book should be exhibited by the secretary, and that the accounts should be regularly audited. If the rules had been properly acted upon, these defalcations would have been discovered. As the societies have thus neglected to investigate the accounts, they cannot now be in a better position than the other creditors.

Bagshawe, Q.C., and *Bond Coxe*, for the building societies.

JESSEL, M.R.:— Judgment.

The question is whether these societies are entitled to the benefit of sect. 12 of the statute 4 & 5 Will. 4, c. 40, or not.

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shall pay out of the estates, assets, or effects, heritable or moveable, of such person all sums of money remaining due which such person received by virtue of his said office or employment before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence, and all such assets, lands, goods, chattels, property, estates, and effects shall be bound to the payment and discharge thereof accordingly."

By the Act 6 & 7 Will. 4, c. 32, for the Regulation of Benefit Building Societies, it was enacted by sect. 4 that the provisions of the Act 4 & 5 Will. 4, c. 40, should be applicable to any benefit building society.

By the Act 18 & 19 Vict. c. 63, the Act 4 & 5 Will. 4, c. 40 was repealed, but not the Act 6 & 7 Will. 4, c. 32.

By the Act 37 & 38 Vict. c. 42, to consolidate and amend the Laws relating to Building Societies, sect. 7, the Act of the 6 & 7 Will. 4, c. 32, was repealed, with a proviso that this repeal should not affect any subsisting society certified thereunder until such society should have obtained a certificate of incorporation under the later Act.

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M. R. 1878 MOORS v. MARRIOTT. Judgment.

Mr. *Marriott* was the secretary and manager of the societies; he kept their accounts and received their money. It is quite true that when he died he had no money of the societies in his hands, because he had spent it all, but his estate which is to be administered is of some value.

The section is as follows:—[His Lordship then read the section.] Under this section the testator's estate must discharge the claim of the societies before all his other debts. But it is said that if the societies had shewn due diligence, and had asked to see the accounts, they would have discovered the defalcations. No doubt: but in my opinion it is the very object of the statute to meet such a case as this. Committees of such societies, as a rule, do not look after their managers properly; they are generally composed of poor people, and the object of the Legislature was that if a society's trustees and officers turned out dishonest, the society should have the right of enforcing its claim against them in priority to all others. But it has been argued that the want of due diligence should now preclude the societies from enforcing their claim.

Now, this is a legal demand and can be destroyed by a legal objection like the *Statute of Limitations*, but there is no equity in any other creditor to get rid of it. The non-enforcement of a legal claim barred at the end of twenty years for nineteen years and 364 days does not entitle any one to object to its enforcement on the last day, nor is a creditor who has stood by for five years and three quarters prevented from calling his debtor to account in the last quarter of the year. There is no legal obligation on the part of a creditor to call upon his debtor to pay.

This is no question now between the societies and other creditors, but between them and their late manager's personal representative. The exact point was decided in a case which I have mentioned of *Englesheart* v. *Ordell*, which, as far as I know, is not reported. In that case a well-known solicitor of *Lincoln's Inn*, enjoying a very good reputation, was appointed receiver in a cause. The solicitors of the Plaintiff and Defendants, also solicitors in *Lincoln's Inn*, were well acquainted with him, and, instead of calling upon him to pass his accounts in the regular manner, allowed him to send in a general account of his dealings as receiver. After his death it was discovered that he had falsified his accounts; he died

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insolvent, and it was found that a very small sum would be available for his other creditors if the claim against him as receiver were paid in full. The persons entitled in the suit under the decree presented a petition to enforce his recognisances.

Judgment.

The petition was dismissed by Vice-Chancellor *Stuart*, but his decision was reversed by the Lords Justices, on the ground that it was no answer to the legal demand under the recognisances, that the solicitors had not shewn proper care in requiring the usual accounts, and that the legal demand was not affected by the want of due diligence. The simple contract creditors could not be heard to say that they had any right to object to the enforcement of a legal demand. I should be bound by that case even if I did not agree with it, which I do.

The claim of the societies must, therefore, be paid in priority to the other creditors.

Solicitors: *A. Hendriks; Kernot & Davis.*

In re ALBION STEEL AND WIRE COMPANY.

M. R.
1878
Jan. 26.

Company—Winding-up—Poor-rate—Priority over other Debts of Company—Applying Bankruptcy Rules to Company in Liquidation—Bankruptcy Act, 1869, s. 32—*Judicature Act*, 1875, s. 10.

The rule in bankruptcy giving local rates due from the bankrupt priority over his other debts (*Bankruptcy Act*, 1869, s. 32) does not, under sect. 10 of the *Judicature Act*, 1875, apply to the case of a company in liquidation.

Statement.

THIS was a summons by the Overseers of the Poor of the Township of *Brightside Bierlow*, who claimed to be creditors of the *Albion Steel and Wire Company, Limited*, now being wound up under an order of the 24th of October, 1876, asking that the liquidator of the company might be ordered to pay to them the sum of £112 11*s.* 10*d.*—being the amount of a poor-rate assessment made in respect of the company's premises on the 22nd of July, 1876—in priority to the ordinary creditors of the company, the company's assets being insufficient for payment of its debts in full.

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In re ALBION STEEL AND WIRE COMPANY.

Argument.

Chitty, Q.C., and *Appleton*, for the summons:—

This application is based on sect. 10 of the *Judicature Act*, 1875, which enacts that "in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, ... as may be in force for the time being under the law of bankruptcy . . . . and all persons who in any such case would be entitled to prove for and receive dividends out of . . . . the assets of any such company, may come in . . . . under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act." By sect. 32 of the *Bankruptcy Act*, 1869, it is enacted that certain debts of the bankrupt "shall be paid in priority to all other debts;" and amongst the debts to which priority is given are included (sub-sect. 1) "all parochial or other local rates" due from the bankrupt.

The question as to how far sect. 10 of the *Judicature Act*, 1875, assimilates the rules in the winding-up of companies to the rules in bankruptcy has been considered in *In re Coal Consumers Association* (1) and *In re West Hartlepool Iron Company* (2). In the former case Vice-Chancellor *Malins* held that the section did not give the landlord of property of which a company in liquidation were tenants a right to distrain for rent due before the winding-up order; and in the latter case Vice-Chancellor *Bacon* did in fact decline to allow rates to be paid in priority to the other debts of a company in liquidation. His Lordship, however, so decided with great reluctance, and simply because he felt himself bound by the terms of a particular local Act. He says: "One cannot find it in the Act, or within the limits of common sense, that because the company is wound up, therefore the liquidators can remain in occupation without payment of rates."

In the present case we submit that this is a "debt provable" within the meaning of sect. 10 of the *Judicature Act*, 1875; and there seems to be no sufficient reason why sect. 32, sub-sect. 1 of

(1) 4 Ch. D. 625. (2) 34 L. T. (N.S.) 568.

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the *Bankruptcy Act*, 1869, should not apply to the winding-up of a company.

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In re ALBION STEEL AND WIRE COMPANY.
Argument.

Bush, for the liquidator, was not called upon, but mentioned an unreported case of *In re Knott*, decided by Vice-Chancellor *Hall* in November last, where it was held that under sect. 10 of the *Judicature Act*, 1875, the rules in bankruptcy did not apply so as to render an unfiled bill of sale void as against the unsecured creditors of a testator (1).

JESSEL, M.R.:—

Judgment.

The 10th section of the *Judicature Act*, 1875, is capable of two constructions, though I think the literal construction is the right one. The section provides as follows:—[His Lordship read it, and continued:—] When you look at the last clause of the section—"all persons who in any such case would be entitled to prove for and receive dividends . . . out of the assets of any such company, may come in under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act"—I think it means simply that the rules in bankruptcy shall apply so far as relates to the proof and receipt of dividends out of the assets of the company; I do not find anything in the Act which says that all the rights and rules of administration under the *Bankruptcy Act* shall apply to the case of a company in liquidation.

It appears to me that the right construction of the section is nothing more than this, that persons may, in the winding-up of a company, make such claims against the assets of the company as are provable under the law of bankruptcy: I see no reason for extending the words of the section beyond that. The particular

(1) The following note of the case referred to was handed up to his Lordship:—

"*In re* KNOTT.

"This was a suit for the administration of the estate of a testator who had given a bill of sale, which had not been filed in accordance with 17 & 18 Vict. c. 36. The testator's estate was insufficient for the payment of his debts in full, and it was contended on behalf of the unsecured creditors that under the 10th section of the *Judicature Act*, 1875, the rules in bankruptcy applied, and that the bill of sale was void against the unsecured creditors. Vice-Chancellor *Hall*, however, held that the rules in bankruptcy did not apply, and that the bill of sale was good against the unsecured creditors."

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M. R. 1878

In re ALBION STEEL AND WIRE COMPANY.

Judgment.

words of the 32nd section of the *Bankruptcy Act* refer to a preference created for the first time by the law of bankruptcy. It is, if I may so term it, a bankruptcy preference, not a preference created by contract.

If the *Judicature Act* had intended that the administration of the assets of a deceased person or the winding-up of a company should be conducted according to the rules of the law of bankruptcy in every respect, it would have said so; but the 10th section expressly says that in the administration of the assets of a deceased person or the winding-up of a company certain rules only of the law of bankruptcy, and not the whole of them, shall prevail; and that appears to me to be the meaning of the section. I am confirmed in this view by two authorities. The first is *In re Coal Consumers Association* (1), before Vice-Chancellor *Malins*, who, however, could not have intended to take such a limited view of the section as some of his observations would seem to imply, for I do not think he intended to decide that it applied only to secured and unsecured creditors.

The other case is an unreported one of *In re Knott*, before Vice-Chancellor *Hall*. There it was contended on behalf of the unsecured creditors of a testator that under the 10th section the rules in bankruptcy applied so as to render an unfiled bill of sale void as against them. Now if the rules in bankruptcy did in fact apply, that would have been so, but the Vice-Chancellor held that those rules did not apply.

I am of opinion that, upon the fair words of the 10th section, the rule in bankruptcy giving priority to rates over other debts due from the bankrupt does not apply to the case of a company in liquidation, and I therefore decide against the applicants.

Solicitors: *Crowder, Anstie, Vizard & Co.*, agents for *N. Creswick, Sheffield; Singleton & Tattershall.*

(1) 4 Ch. D. 625.

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KREHL *v.* BURRELL.

M. R.
1877
Dec. 4, 6.
1878
Jan. 28.

[1876 K. 30.]

Right of Way—Obstruction—Erection of Building after Action brought—Mandatory Injunction—Lord Cairns' Act (21 & 22 *Vict. c.* 27), *s.* 2.

In an action for an injunction to restrain the erection of a building on a passage, over which the Plaintiff claimed a right of way, where he had, on being informed of the Defendant's intention, forthwith given him notice of his rights and commenced the action, and the Defendant had, notwithstanding, continued and completed the erection of the building complained of,—the Plaintiff's right having been established at the trial:—

Held, that it was a case for a mandatory injunction and not for damages under *Lord Cairns' Act*.

Statement.

THIS was an action brought by the Plaintiff, as owner and occupier of a messuage or a public-house, No. 27 *Coleman Street*, in the City of *London*, known as the "*Three Tuns*," with a restaurant and dining-room, to obtain an injunction to restrain the Defendant from erecting a building on the site of an adjoining court, called *Windmill Court*, over which the Plaintiff and his predecessors in title claimed an uninterrupted right of way to or from the said messuage for forty years.

The Defendant had, shortly before the commencement of the action, purchased the houses around *Windmill Court*, and served upon the Plaintiff a notice of his intention to build, and had begun obstructing the access to the Plaintiff's premises, whereupon the Plaintiff informed the Defendant of his alleged rights, and on the 27th of April, 1876, issued his writ. The Defendant, however, continued his building, which was a large and expensive structure, thus blocking up the access to the back of the Plaintiff's house, which was, as the Plaintiff alleged, essential for the purposes of his business, though there was a front entrance in *Coleman Street*.

In December, 1877, the trial of the action came on, and witnesses were examined. The Court was of opinion that the Plaintiff had established his right and gave a verdict accordingly, but directed the case to stand over to see what terms the Defendant would propose.

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M. R. 1878 KREHL v. BURRELL.

Statement.

1878. Jan. 28. The case now came on for judgment. It appeared that the Defendant offered a substituted right of way which the Plaintiff was willing to accept, provided that the Defendant paid him £700 for damages for the difference between the two rights of way, and £100 for being deprived of access to his house by *Windmill Court* during the Defendant's building, and the costs of the action.

The Defendant refused to accede to these terms.

Argument.

Davey, Q.C., and *Everitt*, for the Plaintiff, asked for a mandatory injunction.

Chitty, Q.C., *Hemings*, and *Clare*, for the Defendant, contended that, as he offered the Plaintiff another access to his premises which would be equally convenient, this was not a case in which, having regard to *Lord Cairns' Act*, a mandatory injunction should be granted, citing *Isenberg* v. *East India House Estate Company* (1), *Aynsley* v. *Glover* (2), and *Smith* v. *Smith* (3).

Judgment.

JESSEL, M.R., then gave judgment on the verdict, and ordered that the Defendant should be restrained from erecting upon or across the site of *Windmill Court*, or any part thereof, any building or erection so as to interfere with or obstruct the Plaintiff's right of way or passage over or along the said court as the same existed before the commencement of the action. His Lordship added a mandatory order that the Defendant, within three months from the date of the judgment, take down and remove any building or erection which he had, since the commencement of the action, erected or built on or across the site of *Windmill Court*, or any part thereof, so as to obstruct or interfere with the said right of way. His Lordship then continued as follows:—

Before parting with the case I should like to say a few words about my view of the proper mode of exercising the discretion of the Court in reference to the jurisdiction conferred on the Court by the Act 21 & 22 Vict. c. 27, commonly called *Lord Cairns' Act*. The words of the 2nd section are general: "In all cases in which the Court of Chancery has jurisdiction to entertain an

(1) 3 D. J. & S. 263. (2) Law Rep. 18 Eq. 544; 10 Ch. 283.
(3) Law Rep. 20 Eq. 500.

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application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct."

The plaintiff in this action was the owner of an inn or public-house, No. 37, *Coleman Street*, in the City of *London*, with which he and his predecessors in title had, and enjoyed for many years without interruption, a user of a way or passage, and he claimed to be entitled as of right to such user. The user was undoubted, and the right was never disputed until the purchase by the Defendant recently of the adjoining houses. The Defendant threatened to obstruct the way, and the user of the passage or court, by erecting a large building. The Plaintiff gave notice to the Defendant that he was entitled to such way as of right, and on the Defendant persisting in his threats the Plaintiff brought an action, and issued a writ for an injunction on the 27th of April, 1876. Notwithstanding that the writ was issued, and in spite of the assertion by the Plaintiff of his rights, the Defendant, with full notice, and without any reasonable ground that I could discover at the trial of the action, and indeed without any ground at all, for none has been brought before me, insisted upon obstructing the way, and built over it a solid, and I am told a large and expensive structure, which completely blocked it up.

The action having been commenced in April, 1876, was brought to trial in December, 1877, and upon the trial by oral evidence I thought the right of the Plaintiff clearly established, and gave a verdict accordingly. But, considering the position of the parties, I thought it desirable to give the Defendant an opportunity of coming to terms before I delivered judgment. I thought it more likely he would make good terms before judgment than he would afterwards; and in mercy to the Defendant, so as not to put him entirely in the power of the Plaintiff, I allowed the case to stand over. It seems that some terms have been proposed offering a substituted right of way, which the Plaintiff is willing to accept,

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Judgment.

provided the sum of £800 is paid to him as damages. Whether or not that is a reasonable sum I have no means of ascertaining without a further trial, which of course I do not intend to have, these being terms of compromise and nothing else. At all events the sum in question does not appear to me to come at all within the description of extortion, especially considering the enormous benefit which would accrue to the Defendant by allowing this expensive building to remain. So far I think my object has been accomplished. But, however, the Defendant declines to pay the damages, and prefers, if necessary, to submit to an injunction, which of course he is entitled to do, for he is entitled to decide that for himself.

The question I have to decide is, whether the appeal to me by the Defendant to deprive the Plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is true he has another way to his house by *Coleman Street;* but it was obvious, when the facts were mentioned to me, that as regards the custom of the house it would be very seriously interfered with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the Court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice of the right belonging to the Plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich Defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, "You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,"—of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the

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Lands Clauses Act, to compel people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour, the man with small possessions, of his property, with or without adequate compensation.

Solicitor for Plaintiff: *C. M. Roche.*
Solicitor for Defendant: *E. Burrell.*

HAMPSHIRE *v.* WICKENS.

[1877 H. 112.]

Specific Performance—Agreement for Lease—"Usual Covenants"—Covenant against Assignment without License.

Agreement to accept a lease of a dwelling-house in *London* "to contain all usual covenants and provisoes." The lease contained a covenant not to assign without lessor's consent. In an action to compel specific performance of the agreement:—

Held, that the covenant was not a "usual covenant," and that the agreement could not be enforced.

Haines v. *Burnett* (1) disapproved.

THIS was an action for specific performance of an agreement for a lease.

The Plaintiff, Mrs. *Hampshire*, was at the time of the agreement mentioned in the pleadings lessee of a house in *Elsham Road, Kensington*, for a term of twenty-one years from the 25th of December, 1873, determinable by the lessor and lessee at the expiration of seven or fourteen years, and she had an undertaking in writing from the owners of the property that if she could obtain a responsible and respectable tenant at the rent of 100 guineas

(1) 27 Beav. 500.

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M. R. 1878 HAMPSHIRE v. WICKENS. Statement.

per annum, they would accept from the Plaintiff a surrender of her lease, and grant to such new tenant a lease of the house for the term of twenty-one years determinable by the lessee only at the expiration of seven or fourteen years.

The Plaintiff having placed the disposal of the house in the hands of her agent, Mr. *Parkinson*, the Defendant on the 22nd of February, 1877, had an interview with him respecting a lease, and on the 23rd of February wrote and sent to him the following letter:—

"With reference to our interview last evening, I am willing to take 43, *Holland Road*" (meaning 43, *Elsham Road*), "at the rent of £105 per annum for twenty-one years, determinable at my option at seven or fourteen years, on all usual covenants and provisoes, provided the same be put into ornamental and substantial repair as arranged, and to pay £75 for the fixtures and fittings mentioned in the schedule you left with me. Rent to run from the 25th of March. Possession to be given on the 15th of March next. I shall feel obliged by a definite reply at once as I have other offers."

The Defendant also gave the names of two referees.

On the 24th of February *Parkinson* wrote and sent to the Defendant the following letter:—

"43, *Elsham Road.*

"On behalf of Mrs. *Hampshire*, I accept the terms contained in your letter of yesterday, subject to references being approved by the landlord, which I am quite convinced in your case is simply a matter of form."

The references given by the Defendant were approved of by the owners of the property, but the Defendant subsequently refused to accept the lease, whereupon the Plaintiff brought the present action, and claimed that the Defendant might be decreed to perform specifically on his part the agreement contained in his letter of the 23rd of February, 1877, and to accept a lease of the said house and premises.

There were various grounds of defence, but the only material one relied on by the Defendant was this, that the new lease proposed to be granted him contained the following covenant on the

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part of the lessee, "that he would not, without the previous consent of the lessors, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant, and that he would not, without the consent of the lessors, put up thereon any bill for letting apartments." The Defendant alleged that this was an unusual covenant, and not within the terms of the agreement.

Argument.

Chitty, Q.C., and *Creed*, for the Plaintiff:—

The Plaintiff, who was lessee of the house in question, had an undertaking from her landlords that they would, in the event of another responsible tenant being obtained, accept a surrender of the Plaintiff's lease and grant a new lease at £105 per annum for twenty-one years determinable by the lessee at the expiration of seven or fourteen years. The Defendant, by his letter, which constitutes the agreement, agreed with the Plaintiff to take a lease on those terms, "on all usual covenants and provisoes." It afterwards appeared that the lease under which the Plaintiff held contained a covenant on the part of the lessee, which would be inserted in the lease to the Defendant, not to underlet or part with the possession of the premises without the previous consent of the lessors. This the Defendant contends is an unusual covenant, but it is a less stringent covenant than one not to assign at all, and such a covenant would not, we submit, having regard to the nature of the property, be deemed unusual.

The decisions on this subject are conflicting. In *Church* v. *Brown* (1), followed by *Buckland* v. *Papillon* (2), such a covenant was held not to be usual. On the other hand, in *Haines* v. *Burnett* (3), under an executory agreement to grant a lease of an hotel, to contain "such covenants as are usually inserted in leases of property of a similar description," it was held that the lease ought to be determinable on bankruptcy or insolvency, or on making any assignment thereof for the benefit of creditors.

[JESSEL, M.R.:—In *Hodgkinson* v. *Crowe* (4) the contrary was held.]

(1) 15 Ves. 258.
(2) Law Rep. 1 Eq. 477; Ibid. 2 Ch. 67.
(3) 27 Beav. 500.
(4) Law Rep. 19 Eq. 591; Ibid. 10 Ch. 622.

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M. R. 1878 HAMPSHIRE v. WICKENS. Argument.

In that case there was an agreement for the lease of a coal mine with all usual and customary mining clauses, which it was held could not include a clause of forfeiture in the event of bankruptcy, or a clause in restraint of assignment. But an agreement for a lease of coal is in effect an agreement for the sale of part of the inheritance, and has no analogy to an agreement for the lease of a public-house or hotel.

Usual covenants must always be understood with reference, not only to the property, but to the locality in which it is situated. In *Wilbraham* v. *Livesay* (1) Lord *Romilly* observed: "In this case, though there is distinct notice that the Plaintiff was lessee, there was no notice, except of ordinary and usual covenants, and covenants in restraint of trade are not usual covenants, although in some localities they are common. The case might be varied by the particular situation of the property, as if a house were situated in *Grosvenor Square* I do not say that a covenant against converting the house into a shop would be unusual."

The same principle applies to a covenant not to assign without license. Thus, in *Strangways* v. *Bishop* (2), where a purchaser had agreed to purchase a leasehold house at *Greenwich*, but did not ask to see, and was not shewn, the lease, it was afterwards found that the lease contained a covenant not to assign without the lessor's license. The vendor having filed a bill for specific performance, Vice-Chancellor *Kindersley* said that "it had been objected that the lease contained a covenant that the lessee would not assign without the leave of the lessor, and it was contended by the Defendant that the rule in *Pope* v. *Garland* (3) ought only to apply to those covenants which are usual, and not to such a covenant as this. But, assuming that the covenant not to assign without leave was not a usual covenant—that is to say, one which, upon an agreement to grant a lease with the usual covenants, would be inserted as a matter of course; still, such a covenant was so common and ordinary, at least in or near *London*, that it was such a covenant as came within the *dictum* in *Pope* v. *Garland*, and therefore he did not think the existence of that covenant was any reason why the agreement should not be per-

(1) 18 Beav. 206, 209. (2) 29 L. T. (O.S.) 120.
(3) 4 Y. & C. Ex. 394.

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formed." In this case there is no arbitrary covenant not to assign, as it is stipulated that the lessor's consent would not be withheld from a responsible tenant. The way in which such a qualified covenant is to be construed was considered in the case of *Treloar* v. *Bigge* (1).

Argument.

In *Jarman* and *Bythewood's* Conveyancing (2), under the head of "Leases" there is a dissertation on "usual covenants," and the various cases on the question whether a covenant against assignment is to be so considered usual are collected, beginning with *Henderson* v. *Hay* (3).

In the last edition of *Davidson's* Conveyancing the same subject is treated of (4), and it is only right to mention to the Court that this covenant is not one of the "usual covenants" there specified. In this case, however, having regard to the locality of the property, we submit that the covenant comes within the terms of the agreement and ought to be specifically performed.

J. Hume Williams, for the Defendant, was not called on.

JESSEL, M.R.:—

Judgment.

There are various objections to the contention of the Plaintiff, but I only intend to refer to one of them, which arises thus: the Defendant agreed to take a lease of the house "on all usual covenants and provisoes."

The lease under which this property was held contained a covenant on the part of the lessee that he would not without the lessors' consent, "assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant;" and, further, that he would not without their consent put up thereon any bill for letting apartments.

That was a very special and very unusual covenant, but it is said that it is less extensive than a general covenant not to assign at all, and that if no objection can be made to an unrestricted covenant against assignment none can be made to a covenant that

(1) Law Rep. 9 Ex. 151.
(2) 3rd Ed. vol. iv. p. 297.
(3) 3 Bro. C. C. 632.
(4) 3rd Ed. vol. v. pp. 48, 49.

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M. R. 1878 HAMPSHIRE v. WICKENS. Judgment.

is restricted. I think that reasoning is sound, and shall therefore consider whether an unrestricted covenant not to assign can be inserted among "usual covenants." I am of opinion that it cannot. This was decided by Lord *Thurlow* in *Henderson* v. *Hay* (1), by Lord *Eldon* in *Church* v. *Brown* (2), and more recently by the Court of Appeal in *Hodgkinson* v. *Crowe* (3), affirming a decision of Vice-Chancellor *Bacon* (4), so that it cannot now be fairly disputed.

But I have been referred to a contrary decision in *Haines* v. *Burnett* (5). That case appears to me to be opposed both to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson* v. *Crowe*. In *Haines* v. *Burnett*, Lord *Romilly*, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee, or on his making any arrangement for the benefit of his creditors. That was in fact nothing less than a variation of the contract. I cannot see any reason for holding such a covenant to be usual. Yet it is rather difficult in looking at the case to understand how it was decided. Lord *Romilly* seems to have thought that in considering general covenants, and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property. But I cannot find any evidence on that point mentioned in the report, and it would seem that the Judge, from his view of the nature of the property, inserted the clause. But when we look at the reasoning of Vice-Chancellor *Bacon* in *Hodgkinson* v. *Crowe* (6), I think it is conclusive against any Judge being allowed to say from his own view that such a covenant ought to be introduced. The Court of Appeal affirmed that decision, and went further and held that, under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry except on non-payment of rent.

(1) 3 Bro. C. C. 632.
(2) 15 Ves. 258.
(3) Law Rep. 10 Ch. 622.
(4) Law Rep. 19 Eq. 591.
(5) 27 Beav. 500.
(6) Law Rep. 19 Eq. 593.

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Usual covenants may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind. Lord *Eldon*, in *Church* v. *Brown*, puts it thus (1): "Before the case of *Henderson* v. *Hay* (2), therefore, upon an agreement to grant a lease with nothing more than proper covenants, I should have said they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate." Now what is well known at one time may not be well known at another time, so that you cannot say that usual covenants never change. I have therefore looked at the last edition of *Davidson's* Precedents in Conveyancing, to see whether the usage is said to have changed. He says (3): "The result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing, in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely,

"Covenants by the lessee

"1. To pay rent.

"2. To pay taxes, except such are expressly payable by the landlord.

"3. To keep and deliver up the premises in repair, and

"4. To allow the lessor to enter and view the state of repair.

"And the usual qualified covenant by the lessor for quiet enjoyment by the lessee."

When he refers to "special circumstances" he means peculiar to a particular trade, as for example, in leases of public-houses, where the brewers have their own forms of leases, the "usual covenants" would mean the covenants always inserted in the leases of certain brewers.

There is no mention of any other "usual covenants," and as nothing in this case has been lost for want of industry on the part of the counsel who have argued it, I am justified in saying that

(1) 15 Ves. 264. (2) 3 Bro. C. C. 632.
(3) 3rd Ed. vol. v. pp. 48, 49.

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there is nothing in any text-book or book of precedents to shew that a covenant not to assign is a usual covenant.

I am therefore of opinion that it is not a usual covenant, and I dismiss the action with costs.

Solicitors: *A. Leslie; H. Wickens.*

M. R. 1878 *Feb.* 8.

CHILTON *v.* CORPORATION OF LONDON.

[1878 C. 16.]

Common Rights—Right of Pannage.

A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or an owner of land who keeps pigs, to go into the wood of the grantor and allow the pigs to eat the acorns or beech-mast which have fallen to the ground, and does not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber when ripe.

Statement.

THE Plaintiff was the tenant and occupier of certain cottages and lands in the parish of *Loughton* in the county of *Essex*, and as such claimed to have, with other persons, various rights of common over the waste of *Epping Forest*, including a right of pasture, and in particular "a right of pannage or common of pannage for his swine commonable in the forest levant and couchant on his said lands, according to the assize and customs of the forest." He also claimed, as an inhabitant of the parish of *Loughton*, within the manor of *Loughton*, a "right of lopwood," or a right, exerciseable at certain periods of the year, of cutting or lopping for his own use the boughs and branches of all the trees growing upon the forest waste, in such a way as not to destroy or unnecessarily injure the trees.

The Defendants, the Corporation of *London*, had recently purchased about 3000 acres of the forest waste, including a wood twenty-four acres in extent, called *Hawkswood*, situate in the manor of *Chingford St. Paul*, and finding the wood in a very overgrown state, they proceeded to thin it by lopping. Up to the present time they had thinned about six acres of the wood, and in doing so had lopped some oak-trees.

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Statement.

The Plaintiff insisted that as the oaks so lopped were oaks producing acorns fit for pannage for swine, the Defendants in lopping them were interfering with his right of pannage, and on the 23rd of January, 1878, he obtained an injunction *ex parte* extending over the 1st of February, restraining the Defendants from, amongst other things, cutting, destroying, or injuring any of the trees growing on those parts of the forest waste purchased by them.

The Plaintiff, who was suing in his own name, now moved, on notice, to continue the injunction.

The corporation surveyor stated in evidence, which was uncontradicted by the Plaintiff, that on the purchase of the wood by the corporation he found it had been neglected for a great many years, and that in consequence of its overgrowth some of the trees were dead and others dying; that the wood contained no beeches, and only a few oaks, and consisted chiefly of hornbeam and underwood; that the oaks consisted of pollard oaks and oak spears; that none of the latter had been topped, but shortly before the present proceedings a few of the pollards had been lopped in a proper and husbandlike manner; that instead of such lopping being an injury to the rights of pannage, as suggested by the Plaintiff, it was a very great advantage to the persons entitled to such rights, as it increased the power of the trees to produce acorns by allowing the spear oaks to grow into large trees: that such thinning was also a very great benefit to persons entitled to the right of common of pasture, inasmuch as it let in the sun and air, and thus materially assisted in restoring the vert and herbage: and that shortly before the purchase by the corporation a portion of the wood had been thinned by the then lord of the manor of *Chingford St. Paul*, and was now in excellent condition, the grass especially growing luxuriantly, and affording good pasturage.

The Plaintiff's right of lopwood was not disputed.

Argument.

Davey, Q.C., and *Elton*, for the Plaintiff:—

There is no case upon right of pannage to be found in the books, and therefore we can only proceed by analogy. It is not disputed that the Plaintiff has, as an inhabitant of the parish and manor of *Loughton*, a right of lopwood, a right apparently similar to that of taking estovers, with regard to which the person to be

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first considered is not the lord of the manor, but the tenant claiming the right; as in *Ayray* v. *Bellingham* (1), where, at the suit of a copyholder claiming a right of taking estovers upon his lands without the control of the lord, a commission was directed to set out sufficient timber and wood for botes and estovers according to the custom of the manor; the same to remain to the use of the tenants, and the lord and his heirs to take the rest. It is in fact expressly laid down in *Heydon & Smith's Case* (2) that the lord cannot take all the timber trees, but is bound to leave sufficient for estovers. There seems to be no good reason why the lord should not be similarly restricted where a right of pannage is claimed over his lands.

Sir *James Stephen*, Q.C., *Chitty*, Q.C., and *W. R. Fisher*, for the Defendants, were not called upon.

Judgment.

JESSEL, M.R.:—

The case is one of the strictest right on both sides, and I must decide it accordingly.

It is an action by Mr. *Chilton*, one of the commoners having certain rights over the waste of *Epping Forest*, seeking to restrain the Corporation of *London*, who are the owners by purchase of part of the waste, from doing certain acts. One of such acts is this: Mr. *Chilton*, suing in his own name alone and for his own benefit, says that the corporation have, in a wood which they bought called *Hawkswood*, forming part of the waste, and which is subject to a right of pannage in the commoners, of whom he is one, lopped certain oak-trees, which he says they have no right to do; and he asks the Court to restrain them from lopping any more. It appears that about six acres of this wood have been lopped, and the surveyor to the corporation says that the wood had been neglected and not properly looked after for a great many years, and that some of the trees were dead and others were dying. He also says he found no beeches in the wood—there is, therefore, no question of beech-mast—and there were very few oaks. [His Lordship then read the remainder of the surveyor's evidence, to the effect above stated, and continued:—] That evidence is not

(1) Finch, 199; 6 Vin. Abr. 226. (2) 13 Rep. 67.

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contradicted. Therefore, as I understand it, what has been done as regards the lopping has been done in the proper course of management; it is not, *primâ facie*, an act of waste or destruction. Those acts are proper acts. The mere taking off some of the branches for the purpose of letting in light and air and allowing the other trees to grow is an act done in the ordinary and proper course of the management of the wood, and is not to be described as waste or destruction, or even as injury.

But Mr. *Chilton* says, in effect, "You have no right to cut off any of the branches of any of the pollard oaks, because you may diminish the supply of acorns for the particular year, although you may ultimately increase the supply of acorns in the following year or years by reason of the spear oaks producing more acorns."

Now, the first thing I have to consider is, whether he has any right at all to say so. In my opinion he has not. The books which some years ago, when I was counsel, I searched to the best of my ability, contained very little upon this right of pannage. I was anxious to see whether the industry of the learned counsel engaged in the present case had found anything which I and the learned gentlemen who assisted me upon former occasions had not been able to find; but I am happy to hear that their endeavours have not been more successful than ours were. The subject is, in fact, very obscure indeed. There seems to have been no litigation in past times as to this right of pannage at all, and we can therefore only go by the definitions.

Now the definitions, and the only definitions I am acquainted with, are all the same. They all agree that the right of pannage is simply a right granted to an owner of pigs—the grant was usually to an owner of land of some kind who kept pigs—to go into the wood of the grantor of the right and to allow the pigs to eat the acorns or beech-mast which fell upon the ground. That is what the right has always been defined to be. The pigs have no right to take a single acorn or any beech-mast off the tree, either by themselves or by the hands of those who drive them. There is not even a right to shake the tree. It is only a right to eat what has fallen to the ground.

Now that being so, what rights does it give against the proprietors of the trees? These rights of pannage in old times were

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not unfrequently the subject of grant. I never saw a grant of pannage alone, but I have seen a grant of a right of pannage together with other rights of common. They generally went together. I have seen grants from monasteries or convents to their tenants to take pannage in their woods, accompanied with other rights, actual grants by deed. There is no doubt the right was not unfrequently granted by deed. On the other hand, it was more frequently, probably, enjoyed by prescription or manorial custom; but it was very common in ancient times, and in some parts of the country, especially in *Kent*, it was a right of very considerable value.

Now, has any one ever heard, from the time of *Richard* I. to the present day, of any interference with the grantor of such a right by the grantee to prevent his cutting trees when they were fit for cutting for timber? It is notorious that they have always been cut by the owners when they have become fit for timber, timber being a very useful and valuable thing.

Oak timber and beech timber have been cut throughout the length and breadth of the land from time immemorial by lords of manors and owners of land subject to this right of pannage, so far as I am aware, without a single attempt at interference.

It seems to me, when one looks at the utter absence in the books of any notion of such an interference, that the right of pannage is a mere subsidiary right, and that it does not prevent the owner of the land from cutting down his trees when they are ripe for cutting; *à fortiori* it does not prevent his lopping them in the proper course of management with the view of making them grow better.

It appears to me that the right now set up is extravagant, warranted by no reason or principle, and not supported by authority, and that it does not exist; therefore I have no occasion to consider whether what the Defendants have done would be an infringement of the right if it existed.

I refuse the motion, with costs.

Solicitors: *C. J. Rawlings; Horne & Hunter*, for *The City Solicitor*.

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SPRUNT *v.* PUGH.

M. R.
1878
Feb. 8.

[1861 S. 38.]

Practice—Receiver—Disobeying Four-day Order—Sequestration—Application for Leave to issue, unnecessary—Rules of Court, 1875, *Order* XLII., *rr.* 2, 20; *Order* XLVII.

Under Rules of Court, 1875, Order XLII., rules 2 and 20, and Order XLVII., a writ of sequestration against the estate and effects of a receiver or other person for disobedience of an order of the Court may be issued without the leave of the Court.

Statement.

THIS was a motion to commit the receiver in the cause for having disobeyed a four-day order made on the 17th of December, 1877, directing him to pay into Court a balance which had been found due from him; or for leave to sue out an attachment and subsequent process against him.

Under the special circumstances of the case his Lordship decided not to commit the receiver, and the question then arose whether the Court would enforce the four-day order by granting leave to issue a writ of sequestration against his estate and effects.

Chitty, Q.C., and *Fellows*, for the motion.

Roxburgh, Q.C., and *Daniel Jones*, for the receiver.

Judgment.

JESSEL, M.R., said that as the right of sequestration was now extended by Rules of Court, 1875, Order XLII., rules 2 and 20, and Order XLVII., it was unnecessary to obtain an order for leave to issue a writ of sequestration for non-compliance with an order of the Court, and consequently that the applicant in the present case was entitled to issue a writ of sequestration against the estate and effects of the receiver without any leave from the Court. The costs of the motion to be paid by the receiver.

Solicitors: *Ravenscroft, Hills, & Woodward; Allen & Son.*

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M. R.

1878

Feb. 16.

In re ACCIDENTAL DEATH INSURANCE COMPANY.

Insurance Company — Policy-holders — Limited and unlimited Liability — Winding-up—Marshalling—Compromise by Contributories—Calls for Costs —Exclusive Liability of Contributories who have not compromised—Companies Act, 1862, *s.* 38, *sub-s.* 6; *s.* 160.

In the case of an insurance company in liquidation, whose assets are limited as regards policy-holders and unlimited as regards other creditors, sect. 38, sub-sect. 6, of the *Companies Act*, 1862, is only intended to protect the contributories as against the claims of the policy-holders, and does not affect the liability of contributories who have not compromised their liabilities, under sect. 160, to pay the whole of the costs of the liquidation, although the whole of the nominal share capital has been called up.

The deed of settlement of an insurance company registered in 1854 under 7 & 8 Vict. c. 110, provided that every policy issued by the company should contain a proviso limiting the claims of the policy-holder to the amount of the share capital, but left the liabilities of the shareholders in other respects unlimited.

All the policies issued by the company contained the required proviso.

In 1868 the company was ordered to be wound up.

During the liquidation the whole of the nominal share capital was called up, and several of the contributories compromised their liabilities by agreements with the liquidator in manner provided by sect. 160 of the *Companies Act*, 1862, and Rules of 1862, Sched. III., Form No. 50.

The liquidator having, for the purpose of raising a fund for the payment of the past and future costs of the liquidation, made a further call on those contributories who had not compromised:—

Held, that those contributories were not entitled to require that the amounts received under the compromises should be marshalled between the liability for costs and the liability under policies; and that the contributories who had not compromised alone remained liable for the costs of the liquidation.

Statement.

ADJOURNED SUMMONS.

The *Accidental Death Insurance Company* was incorporated and registered in 1854 under the Act 7 & 8 Vict. c. 110, with a capital of £250,000 in 50,000 shares of £5 each.

The deed of settlement provided that every policy issued by the company should contain "a proviso limiting the scope and effect of the contract thereby created, so that the capital, stock, and funds of the company should alone be liable to answer and make good all claims in respect of any such policy, and that no proprietor of the company should in any manner be personally liable or subject to any such claims or demands, or be in anywise charged by reason of such policy beyond the amount of his or her shares

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of such capital, stock, or funds." As to creditors of the company other than policy-holders, the deed contained no limitation of the shareholders' liability.

Policies were issued from time to time by the company, each containing a proviso limiting the shareholders' liability in respect thereof, as directed by the deed of settlement.

Statement.

In 1868 the company resolved to wind up voluntarily, and an order was made by the Court of Chancery, upon petition, continuing the voluntary winding-up under supervision.

In the course of the winding-up the whole of the nominal share capital was called up, and several of the contributories, with the sanction of the Court, compromised their liabilities by agreements with the liquidator pursuant to sect. 160 of the *Companies Act*, 1862, such agreements being in the form prescribed by the Rules of 1862, Sched. III., Form No. 50.

A sum of £5890 being required for the purpose of meeting the costs already incurred, or to be incurred, in the winding-up before finally closing the liquidation, this summons was taken out by the liquidator making a call of £2 per share upon all the contributories, twenty-seven in number, who had not compromised.

Argument.

Davey, Q.C., and *W. S. Owen*, for the liquidator:—

The rule is, that as between the limited and unlimited assets of a company in liquidation, the costs of the winding-up must fall exclusively on the unlimited assets: *In re Agriculturist Cattle Insurance Company, Ex parte Official Manager* (1). Therefore, in the present case, the "limited fund," that is, the amount of the subscribed capital applicable to the discharge of the claims of the policy-holders, should not bear any part of the costs of the winding-up; but such costs are payable out of the "unlimited fund," that is, out of calls on shareholders beyond their subscribed capital, except in the case of those shareholders who have compromised.

Roxburgh, Q.C., and *W. Barber*, for the twenty-seven contributories:—

We submit that the different compromises related not only to

(1) Law Rep. 10 Ch. 1.

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the liability to pay calls in respect of capital, but also to all liability for costs. If that is so, then of the amounts received from the contributories who have compromised, or who may hereafter compromise, a proper proportion should be attributed to the liability for costs, and should be credited in reduction of any call which is made for their payment.

[They referred to *Companies Act*, 1862, s. 38, sub-s. 6] (1).

Judgment.

JESSEL, M.R.:—

My opinion is that the view taken by the liquidator is the correct one. By the company's deed of settlement there was a limit placed on the liability in the usual way in the case of insurance companies, as regards the claims of policy-holders on the funds of the company: thus they had only a limited liability while the general creditors had the unlimited liability of shareholders to resort to; and it has been decided, and is now settled law, that the costs of winding up fall within the range of liabilities to which shareholders are liable, irrespective of the amount of capital to be paid up on their shares, which forms a part of the funds of the company out of which the policy-holders are entitled to be paid.

That being so, compromises have been made with various contributories under orders of the Court sanctioning them in the usual way, by which those contributories have paid sums of money in satisfaction of all liability, that is, in satisfaction of what is an unlimited liability, having regard to the terms of the 38th section of the *Companies Act*, 1862, under which a new statutory liability is imposed on shareholders when a company is wound up.

Now, it is alleged on the part of the contributories that inasmuch as the policy-holders are only entitled to be paid out of the funds of the company, that is, they are not entitled to be paid anything beyond what the whole capital of the company when paid up would be, and inasmuch as this compromise is general in respect of all liability on the part of the shareholders, it is, in effect, a compromise in respect of two liabilities, the liability to pay up the

(1) A company formed and registered under the Joint Stock Companies Acts is, by virtue of sect. 176 of the *Companies Act*, 1862, a company under the latter Act.

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capital and a liability to pay the costs of the winding-up, and therefore that the compromise being in respect of the two debts or two liabilities, the amount paid by way of compromise must be apportioned between them. That point was, in fact, decided by the Court of Appeal in the case of *Thompson* v. *Hudson* (1), and the answer to that, I think, is very plain, namely, that you have only compromised one liability. The only liability is that imposed by the 38th section of the Act. There is no other. What the 38th section does is to preserve the contract under which the policy-holders were restricted from obtaining payment beyond the funds of the company: it does not at all restrict the liability of the shareholder to pay what he may be required by the general creditors to pay, or the right of such creditors to be paid, but it does restrict the policy-holders' right to be paid to a particular sum; for the 6th sub-section says, "Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby"—and this is the important part of it—"the funds of the company are alone made liable in respect of such policy or contract." It is the last part of the section only that applies to the present case. Therefore, notwithstanding the general words of the section, the shareholders are not to be liable to pay more to the policy-holders than they would have been liable to pay before. The words are, "Nothing in this Act contained shall invalidate," and so on; so that if the argument is pushed to the extreme, it comes to this, that as there is a compromise section also in this Act—the 160th—the compromise is not to vary the contract either. If the company requires money from the shareholders, it is quite plain, supposing the capital has not yet been paid up, that money must, as between the company and the shareholders, be appropriated to the payment of the calls on the shares, and then it would constitute the fund applicable to the payment of the policies.

Therefore, if you throw out of consideration the compromise section as not affecting the rights of the parties, as is the literal construction of the 6th sub-section, you have a sum which, as far

(1) Law Rep. 6 Ch. 320.

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M. R. 1878 *In re* ACCIDENTAL DEATH INSURANCE COMPANY. Judgment.

as the company's deed goes, is applicable to the payment of the calls, and is the only liability the policy-holders can compel the shareholder to pay. The shareholders have, as between themselves and the policy-holders, no equity under the Act to deprive the policy-holders of all the money the Court can get from them, the shareholders, until they have paid their calls.

It seems to me that to adopt a different construction of the Act would be to make it work injustice in favour of the contributories by means of a provision which was only intended to protect the contributories in paying the policy-holders, who are restricted to the funds of the company, that is, the capital.

Upon these grounds, I am of opinion that the costs of the winding-up are not apportionable as between the shareholders who have compromised and those who have not, and there will, therefore, be an order for payment of this call on the shareholders who have not compromised.

Solicitors: *Harper, Broad, & Battcock; Trinders & Curtis-Hayward.*

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JACKSON *v.* NORTH EASTERN RAILWAY COMPANY.

V.-C. M.

1877

Nov. 5, 6, 7; *Dec.* 19.

[1875 J. 76.]

Company—Deed securing Advances—Recital acknowledging Debt—Specialty Creditor.

A deed dated in 1860 between a company, *J.* a director, and certain trustees, recited the acquisition of certain collieries by *J.* on behalf of the company, that the outlay had been provided as to £467,079 out of the company's money, and as to £43,216 by *J.* for the benefit of the company, and thereby *J.*, in consideration of the repayment of the £43,216 being secured in manner appearing, conveyed the collieries to the trustees upon trusts to secure, first, the £467,079, and secondly, the £43,216 "so due to *J.*" The holding of collieries being *ultrà vires* the company, and an Act of Parliament having directed the sale of the collieries, the property was sold and did not realize sufficient to pay the £467,079:—

Held, that the deed of 1860 did not constitute *J.* a specialty creditor of the company, but only operated to give him a charge upon the property comprised in the deed.

Statement.

THE Plaintiff in this suit, who was the son of *Ralph Ward Jackson*, claimed to be entitled, as the transferee of a mortgage given by his father to a Mr. *Watson*, to have the trusts of a deed of the 23rd of February, 1860, carried out under the direction of the Court, and to have payment by the *North Eastern Railway Company* of a sum of £43,216, with interest thereon at 5 per cent. from the date of the deed, amounting altogether to £80,000.

It appeared from the statements in the bill that *Ralph Ward Jackson*, who was formerly a solicitor at *Hartlepool*, was the projector of the system of railways and the harbour which were now established there. The *Hartlepool Railway Company* was originally an unincorporated joint stock company, formed in 1838, and regulated by deed of settlement, but was incorporated by Act of Parliament in 1842. The *Dock Company* was incorporated by Act of Parliament in 1844. The *Clarence Railway Company* was formed in 1829, and during the whole period of the separate existence of the railway companies and the *Dock Company*, up to the time of their amalgamation in 1852, and thenceforward up to the year 1862, the Defendant *R. W. Jackson* was connected with the same companies; first as solicitor, then as managing director, and ultimately

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V.-C. M. 1877 JACKSON v. NORTH EASTERN RAILWAY CO. Statement.

as chairman. During that period it was thought expedient to acquire a number of collieries for the purpose of feeding the railways with traffic and supplying the harbour with business, and in acquiring that property the sum of £467,079 was expended by the company, and the sum of £43,216, the sum now in question, was expended by *R. W. Jackson* out of his own moneys. It was admitted that the expenditure of these sums, though made for the purpose of increasing and securing the traffic of the railways and the business of the harbour, was irregular, and not in accordance with the objects for which the companies were incorporated. This irregular expenditure led to considerable dissatisfaction on the part of many of the shareholders, and eventually a committee of investigation was appointed in the year 1859, the chairman of which was Mr. *Sturge*, a retired merchant of eminence, in whom all parties reposed great confidence. After a year of continuous labour the committee made their report, from which it appeared that the committee were of opinion that although the aforesaid expenditure might have been in excess of the parliamentary powers, yet that the undertaking, with the collieries, buildings, lands, steamships, and other valuable surplus properties and assets of the company, furnished a good and ample security for all the capital, loans, debts, and expenditure of the company. And the committee, deeming it advisable that the exclusive benefit of the valuable traffic to the railway, port, and shipping places of the amalgamated company from the collieries, and that the advances and pecuniary assistance which had been made and rendered by *R. W. Jackson* and the companies, should be permanently and more effectually secured to the undertaking, gave instructions with that object for a deed which was executed on the 23rd of February, 1860. The deed was prepared without any co-operation or suggestion of *R. W. Jackson* and his co-directors, but was solely prepared under the direction of the committee, and was approved of at a general meeting of shareholders.

This deed, which was made between the *West Hartlepool Harbour and Railway Company*, *R. W. Jackson*, and three trustees, recited the various instruments by which the collieries and property were acquired by *R. W. Jackson* and the company for the respective sums of £43,216 and £467,079, and it recited that all the engage-

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ments which the said *Jackson* entered into, and the liabilities he incurred were so entered into and incurred with the concurrence of the board of directors of the company, and solely with a view of securing and increasing the trade and traffic of the harbour and railway companies, and not with any view of promoting the personal interest of the said *R. W. Jackson*, and that he had not gained thereby any pecuniary advantage, but on the contrary, he had expended out of his own moneys sums amounting to £43,216; and, further, that for promoting such objects, the company had from time to time advanced large sums of money, amounting in the whole to £467,079, in purchasing and obtaining, working and carrying on the collieries, and sinking additional pits and constructing requisite buildings, and in consideration of the repayment of the said sum of £43,216 being secured to *R. W. Jackson*, in manner thereinafter appearing, it was declared that the collieries and other property were to be held upon trust in the first place to pay interest at £5 per cent. on the £467,079 advanced by the company, and in the next place, to pay interest at £5 per cent. per annum on the £43,216 so due to the said *R. W. Jackson*, or so much thereof as should for the time being be unpaid, such last-mentioned interest to be paid to *R. W. Jackson*, his executors, administrators, and assigns, by equal half-yearly payments, and it was provided that unless the yearly rents and profits should in the current year be sufficient to pay the last-mentioned interest after the payment of all the preceding interest moneys the said *R. W. Jackson* should not be entitled to receive or be paid the said interest, but only as much thereof as the said rents and profits should be sufficient to pay after all such payments as aforesaid; and so much of the said interest payable to *R. W. Jackson* as the rents and profits should not be able to pay should remain and be a debt (not carrying interest) to be paid and payable to the said *R. W. Jackson* not before, but together with and in the same manner as the said principal sum of £43,216 after payment of the sum of £467,079, and any further sum and sums of money which had been advanced or paid by the company since the 31st of December, these last to be paid to the company as thereinafter provided. There was also provision made in case of any surplus, for investing it as a means of paying off the principal, and subject to those trusts the trustees were to hold the collieries

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in trust for the company. There was also power given to the trustees to carry on the collieries, and to pay the expenses out of the proceeds thereof, and there was a covenant to indemnify *R. W. Jackson* out of the proceeds of the collieries, and from all liabilities incurred in the execution of the trusts.

Statement.

By an Act passed in the year 1863 the collieries were ordered to be sold within five years.

In the year 1865 the amalgamated companies were amalgamated with the *North Eastern Railway Company*, and by the 4th section of that Act all the debts and liabilities of the before-mentioned amalgamated companies were thrown upon the *North Eastern Railway Company*.

It appeared that *R. W. Jackson* had become a liquidating debtor under the *Bankruptcy Act*, 1869.

The bill prayed that the trusts of the deed of the 23rd of September, 1860, so far as they now remained unperformed, might be performed and carried into execution under the direction of the Court; that an account might be taken of what was due to the Plaintiff as assignee of *Robinson Watson*, and the Defendant *R. W. Jackson*, in respect of the principal sum of £43,216, and interest thereon, secured to him by that deed, and that the Defendant, the *North Eastern Company*, might be directed to pay to the Plaintiff what should be found due to him on taking the account; that, if necessary, an account might be taken of all moneys received by the trustees of the same deed, and also all moneys received by the amalgamated company and the *North Eastern Company* in respect of the collieries and properties aforesaid, and of their respective applications thereof, and that the Defendants might be restrained by injunction from applying or dealing with (otherwise than as prayed by the bill) any moneys received or to be received by them as representing the purchase-moneys arising from the said collieries and properties subject to the trusts of the deed of February, 1860; and that accounts might be taken and directions given for ascertaining the rights of the Plaintiff in and to the said collieries and properties, and the proceeds of the sale thereof, and all moneys arising therefrom.

Argument.

Higgins, Q.C., *Loughborough*, and *Fawcus*, for the Plaintiff:—

We contend that the sum of £43,216 and interest claimed in

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this suit is a debt due by the railway company to Mr. *Ralph Ward Jackson*, the father of the Plaintiff. This may be considered as the father's suit, and the contest really is between him and the company. We also contend that we are entitled to have the trusts of the deed of February, 1860, carried into execution under the direction of the Court. It was through the energy and perseverance of Mr. *R. W. Jackson* that the *West Hartlepool Harbour, Railway, and Dock Companies* were established, and that the town of *Hartlepool* rose to be the prosperous town it now is. The money advanced by Mr. *Jackson* for the purchase of collieries and other property enabled the companies to compete with adverse circumstances. Great benefit was derived from the outlay, and it was admitted by the committee of investigation that Mr. *Jackson* in making these advances out of his own money was actuated only by a desire to benefit the companies, and not for his own personal advantage.

Our case is founded entirely on the deed of February, 1860, which we say constitutes a covenant to pay. The defence is that the deed amounted only to a charge upon the trust estate; and that estate having been sold for less than sufficient to pay the prior debt to the shareholders of £467,079, the funds of the company are not liable. But in answer to this, we allege that the company have dealt with the property in such a manner as to produce a much less amount than it would have produced if sold to the best advantage, and on that ground we ask for an account of the dealings with the property and of the amount actually realized. The trustees have never rendered proper accounts in respect of these sales, and it is their duty now to do so.

By the deed of February, 1860, the Plaintiff's debt is fully and distinctly acknowledged, and it is recited that the money was advanced for the benefit of the company. This amounts to a covenant to pay the debt: *Hart* v. *Eastern Union Railway Company* (1). There are several cases cited in *Addison* on Contracts (2) which substantiate this doctrine, that every word which proves a man to be a debtor of any sum shall charge him with payment of the money. The rule is that an acknowledgment of a debt under seal makes it a specialty debt. Where, in a deed, a party admits

(1) 7 Ex. 246. (2) 7th Ed. p. 1008.

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liability to money, a covenant that he will pay the money may be inferred: *Courtney* v. *Taylor* (1). In the case of a mortgage without a covenant to pay, that would still be a specialty debt. *Farrall* v. *Hilditch* (2) is a leading authority shewing that a recital of a debt amounts to an express covenant to pay. The same is shewn by *Marryat* v. *Marryat* (3) and *Barfoot* v. *Freswell* (4); and in *Saltoun* v. *Houstoun* (5) a recital of a debt was held to amount to a covenant to pay it.

This deed was not prepared under the instructions of Mr. *Jackson*, but under the directions of the committee without his knowledge. At the time the deed was prepared the property was in *Jackson's* possession, and he did not then want to sue the company; but if the company came to sue him, he could have proved the knowledge of the directors and the acquiescence of the shareholders. It is our absolute right to have the trusts of this deed carried into execution.

[They also referred to *Ecclesiastical Commissioners of England* v. *North Eastern Railway Company* (6), and *Jackson* v. *North Eastern Railway Company* (7), in which questions arose as to some of the circumstances alluded to in this suit.]

Glasse, Q.C., *J. Pearson*, Q.C., and *Onslow*, for the *North Eastern Railway Company*:—

The cases cited of *Courtney* v. *Taylor* and *Marryat* v. *Marryat* are distinguishable from this. The difference is pointed out by Lord *Romilly*, who decided *Marryat* v. *Marryat*, in the case of *Saunders* v. *Milsome* (8). There he says: "If a debtor executes a deed by which he admits the debt, and then conveys property to a trustee upon trust to sell and pay the debt out of the proceeds, that does not make the debt a specialty debt; but if by the deed he not only admits the debt, but agrees that if it is not paid before a certain time he will pay it, that clearly creates a specialty debt." In that case the instrument contained an agreement to execute a mortgage, with the powers and covenants

(1) 6 Man. & G. 851.
(2) 5 C. B. (N.S.) 840.
(3) 28 Beav. 224.
(4) 3 Keb. 465.
(5) 1 Bing. 433.
(6) 4 Ch. D. 845.
(7) 5 Ch. D. 844.
(8) Law Rep. 2 Eq. 573, 575.

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incidental thereto; and the Master of the Rolls said that as such a mortgage would contain a covenant for payment of the debt, that was in effect an agreement to give a security, which would create a specialty debt, and the debt was therefore converted into a specialty debt.

This sum of £43,216 was not a debt of the company, but *Jackson* purchased the property and collieries for the company, and then conveyed them to the company upon the terms of having the money secured upon the property. He was only to be paid or secured upon the terms of that deed, which postponed his debt to the prior debt of the shareholders. It was a charge upon the property upon certain specified terms, and no more. There was no covenant to pay by the company, and *Jackson* was content to rely upon the effect of that deed. If it had been intended to make the money a specialty debt, the deed would have contained a covenant to pay, and its omission clearly shews the intention of the parties. We do not deny that *Jackson* did everything for the interest of *Hartlepool*, and we fully appreciate his energy and perseverance in the management of the companies. He no doubt thought it a wise plan to purchase these collieries for the advantage of the undertaking, but it could not in any sense constitute a debt due to *Jackson* by the company. It was impossible for *Jackson* to have brought an action against the company for the debt prior to the execution of the deed. Both parties had illegally expended the money for purposes *ultrà vires*, and *Jackson* could not claim payment from the company out of their general assets; and as *Jackson* had really no claim for re-payment, a covenant cannot be inferred. If the bargain was that the company should take on itself the payment of the money, and the money had been expended *intra vires*, then the deed would have been framed very differently. There is no statement in the deed that the company took upon itself the payment of the money, and it is impossible to infer a covenant to pay.

We do not deny that the *North Eastern Company* have taken upon themselves the liabilities of the amalgamated companies, but that does not affect the original illegality of the purchases. The Act of 1863 made it compulsory upon the company to sell the property within five years. That was an acknowledgment that

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the purchases were *ultrà vires*. By the Act 7 & 8 Vict. c. 85, s. 19, companies are expressly prohibited from giving any security for money expended improperly, and if they illegally borrow money, any security they give for such money is invalid. The only way in which it has ever been attempted to evade this Act has been by giving *Lloyd's* bonds. If this is set up as a simple contract debt, then we should set up the *Statute of Limitations*. This deed was prepared under the auspices of Mr. *Sturge* and the committee of investigation. It was therefore prepared with great care, and no doubt the framers of it carefully guarded against any implied covenant.

Hemming, Q.C., and *Lawrance*, appeared for a former trustee of the deed, who was also one of the trustees in the liquidation of the estate of Mr. *R. W. Jackson*.

The other trustee in the liquidation appeared in person.

Higgins, in reply:—

If there be a *bonâ fide* expenditure of money for the benefit of the company, that comes within the principle of *In re Cork and Youghal Railway Company* (1) and *In re German Mining Company* (2). If the shareholders sanction the expenditure of money, and take the benefit of it, then the money, though expended *ultrà vires*, may be recovered just the same as if it had been an act *intra vires*. Acquiescence on the part of the company is sufficient. Acquiescence is as much applicable to a company as to an individual. If we fail to establish a specialty debt, we have, under the case of *Marryat* v. *Marryat* (3), a right to set up a simple contract debt because we have an acknowledgment of the debt. The facts shew that the money was expended for the benefit of the company, and with the sanction and approval of the company.

MALINS, V.C., at the conclusion of the arguments, said one part of the relief sought by the Plaintiff was that the money due to him might be paid out of the assets of the company, but the

(1) Law Rep. 4 Ch. 748. (2) 4 D. M. & G. 19.
(3) 28 Beav. 224.

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Plaintiff also prayed in the alternative that an account might be taken of all moneys received by the trustees of the deed of February, 1860, in respect of the collieries and properties. The alternative relief he could now dispose of. The Plaintiff alleged that the collieries had been sold at an inadequate sum, and under such improper circumstances that he was entitled to have an investigation, and he further alleged that if the properties had been sold for their full value, there would have been sufficient surplus after paying the £467,079 to pay him in full. It appeared that these properties had been sold during the years 1863, 1864, and 1866, and, considering the length of time which had elapsed since the sales, it was most improbable that the Plaintiff could succeed in proving there was anything improper in the transactions, and if such a decree was made, the expense of it, if workable, would be so great that it would be positively detrimental to the interest of Mr. *Jackson* to have a decree in his favour. Lapse of time, and the surrounding circumstances, rendered it improper to grant that part of the relief sought.

With regard to the construction of the deed, that was an important question, and many authorities had been cited which he should desire to consider, and would, therefore, reserve his judgment.

Judgment.

Dec. 19. MALINS, V.C.:—

This case was very fully and ably argued before me on the 5th and two following days in November last. The object of the suit is to recover from the *North Eastern Railway Company* a sum of £43,216, with interest thereon at 5 per cent. from the 23rd of February, 1860, making together upwards of £80,000.

The Plaintiff, Mr. *William Charles Ward Jackson*, claims that large amount as the assignee of his father, Mr. *Ralph Ward Jackson*, who, it is contended, is entitled, under the deed of the 23rd of February, 1860, to the provisions of which I shall have particularly to refer. The Plaintiff claims to be the incumbrancer upon the fund for the sum of between £1000 and £2000 only, and the suit may therefore be practically considered as that of Mr. *R. W. Jackson* himself. [His Lordship then referred to the origin of

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the claim, and stated at length the deed of the 23rd of February, 1860, already set out, and the several affidavits in support of the Plaintiff's case, and continued:—]

Now it was admitted on all hands that the effect of the deed was to make the collieries and other property which were vested in the trustees a security for the £467,079 advanced by the company and the £43,216 advanced by Mr. *Jackson*, and the interest upon those sums respectively. The Plaintiff contends that its effect was also to make his father, Mr. *Ralph Ward Jackson*, a specialty general creditor of the company for the £43,216, with interest from the date of the deed. If such be the true construction of the deed, it is plain that the Plaintiff has no occasion to have the trusts of it, so far as relates to the sale of the collieries, carried into effect. The company having, as it is admitted, a vast capital is abundantly able to pay the amount if liable to do so. With regard to the collieries and other properties comprised in the deed, it was admitted at the hearing that these had been sold in the years 1863, 1864, and 1866, for sums little more than half enough to pay the debt of £467,079 due to the company.

At the conclusion of the argument I disposed of that part of the relief sought by the bill which depended upon the investigation of those sales and re-opening those transactions; and it is not necessary to go further into that part of the Plaintiff's case now than to say that my conclusion was adverse to the Plaintiff.

The only question, therefore, remaining is whether the deed did make Mr. *Jackson* a general creditor of the company for £43,216 and interest. If that was its effect it is certainly remarkable that the right of Mr. *Jackson* should not have been formally brought to the test at an earlier period, as it is clear that an action at law might have been maintained for the debt and interest at any time after its execution, now close upon eighteen years ago. The deed contains no covenant or express contract to pay the debt; but it is contended on the part of the Plaintiff that an acknowledgment of a debt by an instrument under seal amounts to a covenant to pay it; and the Defendants admit that as a general proposition to be correct; and that it is so, is shewn by the cases mentioned in *Addison* on Contracts (1), which was cited by Mr. *Higgins*, by

(1) 7th Ed. p. 1008.

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Saltoun v. *Houston* (1) and *Saunders* v. *Milsome* (2); and the same principle was acted on in *Farrall* v. *Hilditch* (3), where it was held that an agreement under seal not to issue execution upon a judgment at a certain period amounted to a covenant not to do so.

But it is contended on behalf of the company that although this is the general effect of an acknowledgment of a debt by an instrument under seal, it will not have that effect when the acknowledgment is made for a collateral purpose, as they say it was in this case. And they mainly relied in support of that argument upon *Courtney* v. *Taylor* (4) and *Marryat* v. *Marryat* (5). In the case of *Courtney* v. *Taylor* there was a debt which was owing by a man named *Taylor*, who had become a bankrupt, but after his bankruptcy he executed a deed in 1838, in which he acknowledged that the amount in question, the principal sum of £525 and the arrears of interest of £52, making together £577, were still due and owing from the Defendant to the Plaintiff, as the Defendant did thereby acknowledge. Now, therefore, the admission of a debt, as a general rule, by an instrument under seal would amount to a covenant to pay it; and the question was whether it had that effect in this deed. If it was a general and unqualified admission, that was the effect of it, but if the object was to acknowledge that debt merely as the ground of giving security of a particular character for it, then it was not the creation of a personal liability to pay, but was only introduced with the object of giving security. The judgment on that point was given by *Tindal*, L.C.J. He says (6), "To charge a party with a covenant it is necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent. In the present case the question is whether or not the Defendant did by indenture of the 30th of August, 1838, covenant to pay to the Plaintiff the sum of £577 10*s*. The deed contains no express covenant to that effect; but it is argued that such covenant is necessarily implied. Looking at the whole scope of the deed, and considering the situation of the parties"—I may mention that the Defendant who failed to pay the debt had been

(1) 1 Bing. 433.
(2) Law Rep. 2 Eq. 573.
(3) 5 C. B. (N.S.) 840.
(4) 6 Man. & G. 851.
(5) 28 Beav. 224.
(6) 6 Man. & G. 867.

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a bankrupt—"it appears to me that no such intention is to be gathered from it." His Lordship then referred to the recitals, and said: "The Plaintiffs contend that this acknowledgment of a debt due for principal and interest implies a covenant or agreement to pay it. It appears to me, however, that no such inference is to be drawn from this recital. Had it been the intention of the parties that the Defendant should be liable to pay the £577 10*s.*, nothing could have been more easy than to insert an express covenant for payment of the money. In the absence of such a covenant this acknowledgment may be supposed to have been inserted for some other purpose." Then his Lordship comes to the conclusion that the statement of the debt was introduced for a collateral purpose—not for the purpose of creating a personal liability to pay it, but merely as a ground of giving a security. Mr. Justice *Coltman* gave an opinion to the same effect, and then there is the passage in the judgment of Mr. Justice *Maule* which was frequently read in the course of the argument and commented upon, in which he says this (1): "The recitals mention a mortgage of the 31st of July, 1828, and a bond of the same date; and that the mortgage debt and bond still remain unsatisfied, and also a contract of sale for the aggregate amount of principal and interest; and a power of sale is given independently of that contract of sale. The object of the deed appears to have been to leave the Defendant in the same situation as to liability in which he then already stood"—that is, he was not personally liable for it; and the object of the deed was not to create a personal liability—"and the action fails because the recital relied on is not an acknowledgment that the money was due and was payable on request, but to be paid on a conveyance being executed. Where in a deed a party unequivocally admits himself to be liable to pay money, a covenant that he will pay it may be implied. But where the deed sets out the instrument under which the liability arose, and does not expressly affirm that liability, I think the necessity for implying a covenant to pay does not arise. It would not be giving this recital its true and legitimate effect to construe it as a covenant for the payment of the money."

(1) 6 Man. & G. 870.

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This principle was very pointedly brought out by Lord *Romilly* in the case of *Marryat* v. *Marryat* (1). There the question was whether the claimant was entitled to rank as a specialty creditor against the estate of the intestate *Samuel F. Marryat*, or was a mere simple contract creditor. It arose under these circumstances. By indenture dated in 1852, made between *Marryat*, the intestate, and *Hallett*, a creditor, which recited that *Marryat* was indebted to *Hallett* in the sum of £4441 7*s.* 1*d.*, as *Marryat* did thereby admit, and that *Marryat* was unable to pay it, and that *Hallett* had agreed to forbear enforcing payment, and that in consideration thereof *Marryat* had agreed to execute the assignment after-mentioned: it was witnessed that *Marryat* assigned to *Hallett* certain property to which he was entitled under the wills of two relatives upon trust to sell and out of the money received to retain the £4441 7*s.* 1*d.*, and interest, and to stand possessed of the residue in trust for *Marryat*. The deed contained no covenant for payment of the debt, but there were covenants for title and for further assurance only. Under the usual decree for the administration of *Marryat's* estate, the Chief Clerk found that £2805 was due for principal and interest under the deed, but that it was a simple contract debt. A summons was taken out to vary the certificate, by allowing the debt as a specialty debt. The point which the Master of the Rolls, Lord *Romilly*, had to decide was, whether the acknowledgment by an instrument under seal amounted to a covenant to pay.

His Lordship said (2): "It appears to me impossible to distinguish this case from *Courtney* v. *Taylor* (3), and that it is impossible to find a case more in point. In *Courtney* v. *Taylor* there was an acknowledgment of the debt, exactly in the words here used, not merely a statement of the amount of the debt, which was still due and owing, but as *Robert Taylor* "doth hereby acknowledge"—the same recital as here. The question is, what is the effect of that? It is admitted that if the sole object of the deed be to create an acknowledgment of the debt, then it does not matter in what terms that is expressed, and a covenant will be implied; but if the deed has another object, then a covenant will not be implied from that acknowledgment." His Lord-

(1) 28 Beav. 224. (2) 28 Beav. 226. (3) 6 Man. & G. 851.

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ship further on says: "Though you may infer the promise to pay from the recital the promise to pay simply raises a mere assumpsit, unless the object of the deed is confined to that acknowledgment; but if the object of the deed is other than that, and merely collateral to it, then the recital amounts to nothing. In the case of *Courtney* v. *Taylor* (1) nothing could be more clear than that the sole object was to give security for the amount of the debt, and that being the object of the deed, the Court, though there was a recital expressly admitting and acknowledging the debt, said the object of the deed is to give this security and not to alter in any other respect the liability of the parties, and therefore this recital creates no specialty. It is exactly the same here, this is a deed to create a security and containing an acknowledgment of the debt by the debtor, and all the Judges in that case concurred that nothing was to be inferred from the deed to alter the character of the debt, and that there was no necessity for implying a covenant to pay. I am of opinion, consequently, in this case, that no covenant exists, that the Chief Clerk came to a right conclusion, and that the certificate must stand confirmed"—that is, that it was a simple contract debt.

As the situation of the parties to the deed was considered in those cases, it must also be considered in this case. The debt of £43,000 had been irregularly contracted by, but it is plain that it could not have been recovered against, the *West Hartlepool Company* by action or otherwise. Mr. *Jackson* had vested in him the property which had been so irregularly acquired, and that property he would have been at liberty to retain as against the company until they thought fit to pay all that had been expended upon it. That right he did not exercise; but upon the terms of the deed of the 23rd of February, 1860, and the deeds which are there recited, he vested the property in trustees for the company. Then it would have been impossible, in my opinion, that a debt so created on the 22nd of February, 1860, or any day before the date of the deed, could be recovered as a debt against the company. And if it was the intention to create an absolute liability in the company to pay, why was there not a covenant to do so inserted in the deed? The deed is stated to have been prepared by a very experienced and

(1) 6 Man. & G. 851.

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skilful lawyer, the late Mr. *Hawkins*, of this Bar; and if it had been intended to bind the company to pay at all events, I am satisfied he would have inserted the usual covenant to do so. There is also a clause in the deed, which I think shews it was not intended to make the company liable for the debt. The effect of that clause is, that if the interest upon the £43,216 should be in arrear, that interest is not to carry interest; nor does it provide that it is to be paid by the company, but it is to be added to the principal—£43,216, and paid when that is paid, as I read it, out of the securities held for that purpose. If the interest, when in arrear, was only to be charged on the property which was made a security, why should the principal itself be otherwise secured? The one would naturally follow the other. Upon a careful and repeated consideration of the deed—I have considered it with anxiety to see if I could do that which I should have been very glad if I could have done—I am obliged to come to the conclusion that its only object was to make the property which had been acquired by an irregular expenditure, a security for the repayment of that expenditure with interest, and not to create a general and absolute debt of the company.

As the bill, therefore, fails in establishing the liability of the company to pay the debt, and also in reopening the transaction as to the sale of the collieries and other properties, it must be dismissed.

With regard to costs, I confess I am not able to bring myself to the conclusion that the bill should be dismissed with costs; and I particularly am influenced in coming to that conclusion by this, that these disputes were gone into and settled in 1860, when the *West Hartlepool Colliery Company*, by a committee of investigation, presided over by Mr. *Sturge*, who made affidavits that there had been the fullest disclosure—the most complete fair conduct on the part of Mr. *Jackson* and all other persons connected with the company—after that had been done by the *West Hartlepool Colliery Company*, I do not think that the *North Eastern Railway Company* in this suit should have gone into them—they being the assignees of the *West Hartlepool Company*, and being bound by their acts—they ought not, in my opinion, to have raked up these old stories and endeavoured to reopen those most

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painful disputes which had existed, but which were finally settled in 1860. I find by various passages in the answer that they are not satisfied merely to raise the question—the only question which it was necessary to raise in the case—namely, whether the deed operated as a security, and as to the sale of these collieries, and the price at which they were sold, and the persons to whom they were sold, and the circumstances under which they were sold, but they say "that the sum of £43,216 in the Plaintiff's bill and in the said indenture of the 23rd of February, 1860, mentioned, was not, and that no part or item thereof was ever in any sense a debt due and owing to the said Defendant, *R. W. Jackson*, from or by the amalgamated company. We further say and contend that even if any payments were in fact made by the said Defendant, *R. W. Jackson*, out of his own moneys on behalf of the said companies, or any or either of them, while he was a director of them, such payments were made for illegal objects and purposes, and were not made at the request of the company." So that while they have said under their own hand and seal that this money has been expended for the benefit and advantage of the company and not for the benefit and advantage of Mr. *Jackson* himself, by their answer they contradict everything they have said by their deed, and they have raised, in my opinion, a most unjustifiable defence.

There is also another circumstance which is very much to be deplored, that while the amalgamated company obtained an Act of Parliament in 1863 enabling them to sell their collieries, and providing that the £467,079 advanced by them should form part of the debenture debt of the company, yet, for reasons I am perfectly unable to comprehend, the £43,216 advanced by Mr. *Jackson*, and standing under precisely the same circumstances, was not put upon the same footing, and was wholly omitted, and he has been left without payment of a single penny in respect of it.

Under all these circumstances, although I am obliged to come to the conclusion there is no covenant, I am strongly of opinion that it is a debt which ought to have been paid; but being obliged to dismiss the bill, I dismiss it without costs.

Glasse, Q.C., asked whether his Lordship had considered, with

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regard to the costs, that in this suit the Defendants were called upon by interrogatories to set forth exactly the same accounts which years before had been set forth in a previous suit.

MALINS, V.C.:—

I have considered that part of the case as well as all the other proceedings in the suit. Although Mr. *Jackson* has gone into the accounts again, it was not incumbent upon the company to set them out. They might have declined to do so on the ground that they had already been set out in the other suit. I still adhere to my determination to dismiss the bill without costs.

Solicitor for Plaintiff: *W. F. Nokes.*

Solicitors for Defendants: *Bell, Steward, & Co.; Lawrance, Plews & Co.*

STANLEY *v.* STANLEY.

V.-C. M. 1878 Jan. 26.

[1864 S. 165.]

Fraud of Married Woman—Separate Use—Without Power of Anticipation—Judgment—Charging Order.

A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation.

The mortgagee obtained a judgment against her for the amount lent, and a charging order to charge her next accruing dividend:—

Held, that such charging order must be discharged; for in no case and by no device could the restraint upon anticipation be evaded.

Statement.

MRS. STANLEY was entitled, under a will, to a sum of over £400 a year for her separate use, without power of anticipation, under her father's will. This will was stated in a bill filed in a Chancery suit, and the clauses including the words "without power of anticipation" were set out in inverted commas. Mrs. *Stanley* and her husband desiring to borrow £1000 from the *Equitable Reversionary Interest Society* in 1873, her interest under the will was offered as a security, and the following fraud was committed.

The husband produced to the society what purported to be the bill in Chancery in which the above-mentioned will was set out,

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and the part relating to the interest of Mrs. *Stanley* under it was printed in inverted commas; but he had previously erased from the printed bill the words "without power of anticipation," and caused the bill to be reprinted with this fraudulent omission.

Statement.

There was evidence that Mrs. *Stanley* was cognizant of the fraud.

The solicitors of the society caused the probate of the will to be examined, but their clerk, being thus misled, did not notice the suppression, and the money was lent. Mr. and Mrs. *Stanley* gave a warrant to confess judgment as an additional security. Judgment was entered against them on the 9th of December, 1873, and a charging order was obtained in pursuance of the judgment to charge the next accruing dividend of Mrs. *Stanley's* fortune with the payment of the £1000 so far as it would go.

The question to be decided was whether in a case of gross fraud such charging order could operate against income not due at the date of the charging order, which the married woman had no power to anticipate.

The Chief Clerk had declined to discharge the charging order.

Argument.

J. Pearson, Q.C., and *Brice*, for Mrs. *Stanley*:—

The provision against anticipation ought not to be encroached upon: *Arnold* v. *Woodhams* (1); *Kenrick* v. *Wood* (2).

Glasse, Q.C., and *B. B. Rogers*, for the creditors holding the charging order:—

We rely on the judgment and charging order. A married woman's income was made liable for her misappropriation in *Pemberton* v. *M'Gill* (3). In *Claydon* v. *Finch* (4) it was held that under a writ of sequestration the accruing dividends of a married woman's fortune could be taken though there was a restraint upon anticipation.

Judgment.

MALINS, V.C.:—

This is a case in which I can entertain no doubt. I consider that the fraud was fraud both of the husband and the wife, for the

(1) Law Rep. 16 Eq. 29.
(2) Ibid. 9 Eq. 333.
(3) 1 Dr. & Sm. 266.
(4) Law Rep. 15 Eq. 266.

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circumstances shew that she knew what her husband intended to do and did. But notwithstanding this, I am bound to hold that in no case and by no device whatever can the restraint upon anticipation be evaded, and I must discharge the charging order.

V.-C. M. 1878 STANLEY v. STANLEY.

Solicitors: *Boxall & Boxall; Clayton & Co.*

MOFFATT *v.* FARQUHAR.

V.-C. M. 1877 Dec. 17, 18, 19. 1878 Jan. 21, 28.

[1876 M. 133.]

Unlimited Company—Provisional Registration under 7 & 8 Vict. c. 110—Transfer of Shares to create Votes—Power of Directors to refuse Transfers.

A company with unlimited liability was formed in 1843 under a deed of settlement, and was afterwards provisionally registered under 7 & 8 Vict. c. 110. By their deed of settlement no shareholder was to have more than twenty votes, however large the number of shares held, and the directors had power to approve or disapprove of any person proposed by a shareholder as a transferee of his shares. A difference arose among the shareholders as to the management of the company, and the Plaintiff, who was a large shareholder, transferred some of his shares to one person for value, and other shares to another person as trustee for himself, in order to increase his voting power. The directors refused to approve of the transfers, not from any personal objection to the transferees, but on the ground that the transfers were colourable, and were intended to increase the votes of the transferor:—

Held, that the company was not a mere partnership, but came within the laws applicable to joint stock companies; and that the directors had no power to refuse a transfer, which was a right of property, except upon personal objection to the transferee. They were therefore ordered to approve of the transfers.

An inquiry was also directed as to damages.

Statement.

THE *New British Iron Company* was formed under a deed of settlement, dated the 2nd of November, 1843, and certain powers were granted to them by a private Act of Parliament, 7 Vict. c. 30, and under those powers the Defendant, as a director and proprietor, sufficiently represented the company. The company was also registered under the 58th section of the Act 7 & 8 Vict. c. 110, but had not been completely registered under that Act. The deed of settlement contained the following clauses:—

58. "That if five or more proprietors present at any general meeting of proprietors, and qualified to vote at a ballot as herein

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is mentioned, shall, either before or after the voting, by shew of hands, demand that the votes thereupon be ascertained and taken by ballot, then the same shall be done accordingly, and in case of such ballot every proprietor holding twenty shares in the company shall have one vote, and one additional vote in respect of each complete number of twenty shares (beyond the first twenty) held by him in the company, but no shareholder shall have more than twenty votes on the whole."

Sect. 82 was in these words, omitting parts not applicable to the present case:—

"That it shall be lawful for every proprietor of a share or shares in the company to procure some person or persons to become a proprietor or proprietors in respect of all or any of the shares for the time being belonging to such proprietor. And when any such proprietor shall have procured some person or persons who is or are willing to become a proprietor or proprietors, such proprietor shall give notice in writing at the office of the company of his or their having done so, and request the board to certify their approbation or disapprobation of such person or persons, and shall describe in such notice the full name and the profession or calling and place of abode of the proposed proprietor. And if the person or persons so proposed shall be approved of as hereinafter is mentioned, then and in such case such proprietor may transfer the same to such person or persons, and thereupon each or any such person shall, upon executing at the office of the company, or at such other place as the board of directors shall require, a deed of covenant to abide by the rules and regulations of the company, be entitled, as regards the share or shares so transferred to him or them, to call upon the board of directors to enter his name in the share register book, and the board shall accordingly do so, and upon such entry being made he shall become the proprietor or proprietors thereof: Provided nevertheless that no share or shares shall be transferred until all instalments or calls actually due and payable in respect thereof shall have been fully paid up."

Sect. 84. "That as well every transfer of a share as every deed of covenant to be executed as aforesaid shall be prepared according to a form to be sanctioned and approved of by the board

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of directors, and no share in the company shall be transferred by any proprietor to any person who has not been first approved of by the board of directors or the committee of directors appointed as aforesaid, and if any transfer of any share or shares shall be made or attempted to be made to any person who has not been approved, the same shall be void."

The Plaintiff was the registered proprietor of 3031 shares in the company. In the year 1875 the Plaintiff and certain other proprietors (including Mr. *Wythes*, a director of the company), who held altogether more than three-fourth parts of the total number of shares, were desirous of having the company registered as a limited company under the *Companies Act*, 1862, and for that purpose to pass a resolution of the company in favour of such registration at a meeting of its members summoned for the purpose: a majority of three-fourths of the votes of the members present at the meeting being required by the Act to pass such resolution. They were, however, opposed by the Defendant and five other directors forming a majority of the directors of the company (there being only eight directors in all), and in consequence of clause 58 of the deed of settlement, the above-mentioned shareholders, who were desirous of passing the said resolutions were not able to do so at the meeting of the shareholders summoned for the purpose on the 15th day of February, 1876.

In the month of November, 1875, the Plaintiff agreed to transfer to Mr. *Roger Eykyn* 400 of his shares for the sum of £3200. The Plaintiff also at the same time made a similar agreement to transfer to his nephew, Mr. *Robert Moffatt*, 400 of his shares for the sum of £3200.

On the 29th of November and the 6th of December, 1875, the Plaintiff, having thus duly procured persons willing to become proprietors in respect of the said 400 and 400 shares respectively, sent to the office of the company a notice in writing of his having done so, and of the said agreements, and requested the board of directors of the company to certify their approbation or disapprobation of the proposed transferees.

The said Mr. *Wythes*, about the same time, sent to the directors a notice in writing of his desire to transfer certain of the shares held by him.

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The Plaintiff alleged that the Defendant and the five other directors who were adverse to the registration of the company as a limited company perceived that if the Plaintiff, and Mr. *Wythes*, were allowed to make transfers of some of their shares, the majority of the three-fourth parts of the votes of the company requisite to pass the resolution would in all probability be obtained. They accordingly determined to use the powers given to them by the deed of settlement for their own purposes and advantage, so as to prevent any transfers whatever of any of their shares by the Plaintiff, or by Mr. *Wythes*, or by any of the proprietors who were in favour of the registration of the company as a limited company, which might increase the voting power of those who favoured such registration.

In accordance with the above determination the directors, on the 7th of December, 1875, passed the following resolution and communicated the same to the Plaintiff:—

"Mr. *Wythes*' letter to the secretary of the 30th of November relating to the proposals for transfer sent in by him on the 19th of November was laid before the board, also a proposal by Mr. *George Moffatt*, dated the 29th of November ultimo, to transfer 400 shares standing in his name to Mr. *Roger Eykyn*, the consideration being £3200, and a further proposal by the same gentleman, dated the 6th of December instant, to transfer 400 shares standing in his name to Mr. *Robert Moffatt*, the consideration being £3200, when it was resolved unanimously,

"That the board having fully considered the above-mentioned proposals, do not approve of the same, and that a communication to that effect be made to Mr. *Wythes* and Mr. *Moffatt*."

The Plaintiff alleged that this resolution was passed by the directors, not in a *bonâ fide* exercise of their discretion, or for the interests of the company, but solely for their own private purposes, and in pursuance of and to carry out their determination. The directors had not, and never had, any grounds of objection to the proposed transferees personally, who were in every respect fit and proper persons to be proprietors of the shares in the company proposed to be transferred to them, and who had always been and were still ready and willing to accept and execute a

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proper transfer to them of the shares respectively. That the directors, in fact, never made any inquiries of the Plaintiff or otherwise as to the proposed transferees or the circumstances under which the transfers were executed.

The Plaintiff, on being informed of the refusal of the directors to accept *Roger Eykyn* and *Robert Moffatt* as transferees of the shares, endeavoured to ascertain from the directors what grounds they alleged they had for such refusal, and offered to prove that *Roger Eykyn* and *Robert Moffatt* were proper persons to become proprietors in the company. The directors, however, declined to state any reason for their refusal, or for objecting to the proposed transferees.

In consequence of this determination of the directors, the Plaintiff's shares in the company had diminished in value, and the Plaintiff would have to accept from *Roger Eykyn* and *Robert Moffatt* smaller prices for the shares agreed to be transferred to them than the prices agreed upon for the shares in November, 1875, by which he had sustained considerable damage.

The Plaintiff claimed as follows:—

That the *New British Iron Company* might be ordered to approve of *Roger Eykyn* and *Robert Moffatt* respectively as proprietors of the company in respect of the said 400 and 400 shares, and to certify such approbation. He also claimed damages for the improper refusal on the part of the company to approve of the transferees, and for the said improper conduct on the part of the directors.

The statement of defence was to the effect that the capital of the company was £400,000 divided into 20,000 shares of £20 each; only 19,860 shares had been issued, and upon them £17 each had been paid. The company had borrowed on debentures, and now owed £60,000. The Plaintiff was owner of 3031 shares, Mr. *Wythes* was the owner of 4085 shares, and one other shareholder held 2036 shares. Very few other shareholders held more than 400 shares each. The total number of shareholders was sixty-seven.

The Plaintiff, with Mr. *Wythes*, Mr. *Clive*, and a few other shareholders, had for some time been desirous of converting the company into a company with limited liability. The majority of the directors were of opinion that if such conversion were effected the

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capital of the company should be increased in order to support their credit, and after much consideration the directors proposed a scheme of conversion under which every £20 share would be changed into a share of £30, but such scheme not being within the powers of the deed of settlement it was necessary to have the consent of all the shareholders. The Plaintiff and those who sided with him were desirous of having an immediate conversion. In August, 1875, the directors received from Mr. *Wythes* five applications for transfers of shares, but the directors, believing that the transferees were intended to be mere trustees for Mr. *Wythes*, and that the only object was to enable him to have at his own disposal the additional votes that would be thereby created, they refused to approve of any of the transfers, and informed Mr. *Wythes* that, in the absence of satisfactory explanations as regarded the transfers, the directors did not feel justified in approving them. On the 29th of November, 1875, the application was made by the Plaintiff for transfer of 400 shares to Mr. *Eykin* in consideration of £3200, and on the 6th of December for a transfer of 400 shares to Mr. *R. Moffatt*, also in consideration of £3200. The board of directors duly considered these applications, and believing such transfers to be intended merely as transfers in trust for the Plaintiff, and for the purpose of enabling the Plaintiff to have the command of forty additional votes, they refused to approve of such transfers. The Plaintiff afterwards inquired as to the reason for such refusal, and the directors stated that the decision they had come to was in the interests of the company.

Upon the hearing of the action the four principal witnesses examined were Mr. *Eykyn*, Mr. *R. Moffatt*, Mr. *Farquhar*, and Mr. *Round*, the chairman of the company.

Mr. *Eykyn* stated that the purchase by him was *bonâ fide*, and that he was ready and willing at the time of the purchase to pay £3200 for the shares; that he was desirous of becoming a member of the company, and that he entertained the same views as the Plaintiff in regard to the propriety of converting the company into a company with limited liability.

Mr. *R. Moffatt*, the nephew of the Plaintiff, stated that it was not intended that he should actually pay for the shares to be transferred to him, but that he was to be a trustee for his uncle.

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Mr. *Farquhar* and Mr. *Round* gave details as to the position of the company, and confirmed the statements in the answer. They said it was the opinion of all the directors that it would be desirable to effect a conversion of the company, but they considered that it would injure the credit of the company to effect the conversion without increasing the capital, since at the present time all the money due upon the shares was called up except £3 per share, and there were debentures to the extent of £60,000; consequently the £3 per share would only be sufficient to satisfy the debenture debt, and there would be no further capital wherewith to carry on the business of the company.

Statement.

Higgins, Q.C., and *Romer*, for the Plaintiff:—

Argument.

The question in this action arises upon the 82nd section of the deed of settlement, which gives power to the board to certify their approbation or disapprobation of such persons as shall be submitted to them for the purpose of becoming proprietors of shares. This clause gives power only to raise a personal objection, and the directors have no further right to exercise a veto when they are called upon to certify their approbation or disapprobation. The board of directors say they are not bound to give any reason for refusing a transfer, but in fact they do give a reason, which is, that they do not approve of Mr. *Moffatt* having more than twenty votes. They do not allege any personal objection to Mr. *Eykyn* and Mr. *W. Moffatt*, who are altogether unexceptionable persons.

The case of *In re Stranton Iron and Steel Company* (1) is conclusive in favour of our argument, for there the largest creditors of the company required their transfers to be registered for the express purpose of increasing their voting power, and Vice-Chancellor *Bacon* ordered the transfers to be registered in time for the meeting then about to be held. Even in a case like the *National and Provincial Marine Insurance Company* (2), where an attempt was made to transfer shares to escape liability, and where the shareholder had gained time for his transfers by a trick, Sir *J. Rolt* felt great difficulty in refusing to direct the transfers to be registered, because he said that the transfers, made expressly to

(1) Law Rep. 16 Eq. 559. (2) Law Rep. 2 Ch. 685.

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escape liability, did not necessarily vitiate the transfer, but he did not think it just and equitable under the circumstances to compel the directors to accept the transfers.

The directors under such a clause as this, it seems, are not bound to disclose their reasons for refusing a transfer: *Ex parte Penney* (1); but if there is evidence to shew that the power has been exercised capriciously or unfairly the Court has jurisdiction to interfere. The same principle was acted upon in *Robinson* v. *Chartered Bank* (2). The Court will not even permit unnecessary delay in registering a transfer, as was decided in *Nation's Case* (3), *Lowe's Case* (4), and *Fyfe's Case* (5).

In *Pinkett* v. *Wright* (6) it was held that directors had no power to refuse a transfer until the transferor had paid a collateral debt which they claimed from him, that is, they could not exercise the power given them for one purpose, for another.

The Master of the Rolls decided in *Pender* v. *Lushington* (7) that it was perfectly lawful for a person to transfer his shares for the purpose of multiplying his votes. These directors are not exercising their power reasonably and properly, and therefore we have a right to come to the Court to compel them to do so.

Sir *H. Giffard*, S.G., *J. Pearson*, Q.C., *Wolstenholme*, and *Mansel Jones*, for the Defendant:—

Even if this were a joint stock company, the power given to the directors would be a discretion vested in them for the general benefit of the company, and the Court would not interfere with that discretion if exercised *bonâ fide*, and not from any outside or indirect motive. But we contend that it is not a company in the sense used by the Plaintiff's counsel, and the cases cited have no application here, because we are not dealing with those bodies which have been created by the Legislature, and as to which certain incidents both by statute and by the construction of the Courts have been attributed; but we are dealing with a partnership having particular regulations of its own, and the law of partnership is the law applicable to this body; we have nothing

(1) Law Rep. 8 Ch. 446.
(2) Ibid. 1 Eq. 32.
(3) Ibid. 3 Eq. 77.
(4) Law Rep. 9 Eq. 589.
(5) Ibid. 4 Ch. 768.
(6) 2 Hare, 120.
(7) 6 Ch. D. 70.

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to do with what is called company law. But if by any regulation sanctioned by law even an ordinary company had made such a regulation as exists here, and it had been part of the constitution of the company that no change should be made in the numbers of shareholders and in the transfer of shares without the sanction of the directors for the express purpose of limiting the voting power of particular shareholders, there is no authority upon such an hypothesis as that in which it has been held that the Court would not enforce it. No case has been cited which is analogous to this. There is no case in which the Court has defeated the intention of the constitution of the company. In a private partnership a new partner cannot be introduced without the consent of all the other partners, but here the partners generally have delegated to the directors that power, which, but for that provision in the deed, they would themselves have been entitled to exercise, and which any one shareholder might have defeated. This is a power constructed for the benefit of all the shareholders, and it is not limited to the person of the transferee. Mr. *R. Moffatt* admits that he was to be a trustee for his uncle, therefore as to him the transfer was clearly colourable.

The case of *Pender* v. *Lushington* (1) proves no more than this, that, assuming the right to transfer, you cannot qualify that right except upon some principles which the law will recognise. Here there is no such question arising. In that case the right to transfer was admitted; here the whole question is whether there is a right to transfer.

We submit that this is in all respects a private partnership.

The case of *Taft* v. *Harrison* (2) has an important bearing on this case. That was a company in which the shares were transferable in one of two ways, and the Court decided that the company being unable to adopt the alternative of purchasing the shares, that did not give the shareholder the alternative relief of being able to sell his shares to an outsider, and that the company being on the eve of being wound up, that was a sufficient justification for the directors refusing any transfer.

In the case of *Ex parte Penney* (3), the transferee was to be

(1) 6 Ch. D. 70. (2) 10 Hare, 489.
(3) Law Rep. 8 Ch. 446.

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approved of by the directors, and the board refused to transfer without assigning any reason whatever; and the Court said they could not sit upon appeal from the decision of the directors unless it could be shewn that they acted from some improper motive; and Lord Justice *Mellish* said that as it was an insurance company it was of the greatest importance to secure a responsible body of shareholders.

Then as to the other cases cited. In *In re Stranton Iron and Steel Company* (1) there was no limit there to the voting power. There was nothing to prevent the *Crédit Foncier* from splitting up their shares so as to get a larger voting power. That case only proves that where there was no limit to the power of voting, and where there was no limit as to that which did come within the operation, the parties holding the shares had a right to transfer them to whom they pleased, and the directors had no voice in the matter.

1878. Jan. 21. *Higgins*, in reply:—

The questions raised by the Defendants are these: First, whether the company is a mere partnership as distinguished from a joint stock company, and, therefore, whether the cases I relied upon are entirely excluded from consideration of the main question; secondly, whether the limitation on the voting power contained in the deed of settlement of the company is a portion of the constitution of the company absolute and irrevocable, and one that overrides or interferes with the provision relating to the power to transfer; or, on the other hand, whether the limitation on the voting power is not subject to the power of transfer, and whether it does or not in any way interfere with the power of transfer; and, thirdly, it was said as to one of the transfers that it was a colourable transaction, and therefore the Plaintiff could have no assistance from this Court in respect of it. On the last point it need only be said that the transfer to Mr. *Eykyn* is proved to have been for valuable consideration, and the transfer to Mr. *R. Moffatt* was that he should be a trustee for the Plaintiff, and such a transfer is perfectly good, since a man has a right to give his shares away, or to do what he likes with them.

As to the first point, I contend that this is not a mere partner-

(1) Law Rep. 16 Eq. 559.

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ship. Although it has not been registered under the Act of 1862, it was registered provisionally under the Act 7 & 8 Vict. c. 110, and the company was constituted as a company with all the *indicia* and characters of a company by the original deed of settlement. It is there treated and formed and constituted as a company, and it is called a company in the special Act of Parliament. Moreover, it is a company within the definition of a company contained in the 181st section of the *Companies Act*, 1862, and also within the Act of 1844. By the deed of settlement the capital is divided into shares, which are made transferable; there are provisions for appointing the board of directors, and there are all the characteristics of a company, and in the special Act there are powers for the conduct of its affairs in various ways, and providing for a power to sue during winding up in case of dissolution, and containing the expression that "the company" shall mean "the *New British Iron Company*," together with all such provisions as are applicable to companies. But even if this were a mere partnership, the power of transfer is a paramount feature in the constitution of this company, and it would be incompetent for any majority of the shareholders to alter that fundamental characteristic of the power to transfer shares, though they might alter their voting power. The case of *Lovegrove* v. *Nelson* (1) is directly in point upon that subject, as are also the observations in Mr. Justice *Lindley's* book (2).

Then, secondly, it is said that the limitation on the voting power is part of the constitution of the company, but if I am right in my first contention this argument cannot be sustained, for the question is settled by the case of the *Stranton Iron Company* (3), in which that was the only question raised, and the transfers were made for the express purpose of increasing the voting power. The case of *Ex parte Penney* (4), which has been cited, is distinguishable from this, because there it was said that it would be an abuse of the power of vetoing a transfer to object on any ground not applying personally to the transferee. In this case there is direct evidence that the only ground of exclusion was the increase of the voting power, and there was no question as to solvency.

(1) 3 My. & K. 1.
(2) 3rd Ed. p. 719.
(3) Law Rep. 16 Eq. 559.
(4) Ibid. 8 Ch. 446.

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In *Pender* v. *Lushington* (1) the transfers had no doubt been effected. In that case, like this, there was a limited voting power, and the same question arose as in this case. It was insisted that the object of the transfer was adverse to the interests of the company. The Master of the Rolls said that the company had no right whatever to enter into the question of the beneficial ownership of the shares, and the votes ought to have been admitted as good votes, independently of any inquiry as to whether the parties tendering them were or were not trustees for other persons beneficially entitled to the shares.

Judgment.

MALINS, V.C.:—

This is a case of very great importance as affecting the interests of shareholders in joint stock companies. The *New British Iron Company* is one of long standing, having been formed by deed of settlement in 1843. It is therefore of thirty-five years' standing, and, from all I have heard, it is likely to have a perpetual existence. The total number of shares issued is 20,000 of £20 each. There have been 19,860 shares issued, and of these Mr. *Moffatt* holds 3031, Mr. *Wythes*, who takes the same view as Mr. *Moffatt*, holds 4085, and Mr. *George Clive* 2026 shares; so that these three gentlemen hold 9140 shares, or nearly half the number of shares issued. The amount paid up is £17 per share, therefore Mr. *Moffatt's* interest is very large, amounting to more than £60,000; but at the present nominal value of the shares, which is said to be £8, it is not less than £24,000.

It appears that in the year 1875 differences of opinion arose between some of the shareholders in this way: The company being one of unlimited liability, and every shareholder being consequently liable for every farthing he has in the world, it seems to have occurred to Mr. *Moffatt* and some other shareholders that it would be very desirable to turn this company into one of limited liability, under the powers contained in the *Companies Act*, 1862. I have heard from Mr. *Round*, the chairman of the company, that all the directors concurred in thinking it would be desirable to turn this into a limited company, and one cannot be surprised that it was the wish of all parties to effect so desirable a

(1) 6 Ch. D. 70.

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change, but they considered that it was necessary, if such conversion was effected, to increase the capital of the company also. £17 having been paid upon each share, there remains only £3 to be called up, that is, £60,000, and that sum has already been borrowed upon debentures, so that in fact the whole capital of the company is exhausted for carrying on the business, and therefore it was stated that it would be necessary to have some capital to resort to, otherwise the public would lose confidence in the company, and they would not be able to carry on their business with the advantages they now have if it were known that every farthing of their capital was called up or expended. If I were to give my opinion as between the different views, I should say the view of the directors was a very reasonable view, and it is one which Mr. *Moffatt* and those who coincide with him would probably have concurred in if they had gone into a discussion of the subject, and it probably would have resulted in some view half-way between the extreme views being adopted, and instead of turning the £20 share into £30, as the directors wished, which would have thrown upon Mr. *Moffatt* a liability of more than £30,000, upon Mr. *Wythes* £40,000, and upon Mr. *Clive* £20,000; possibly they might have adopted a middle course, and reasonably have said that the further liability should be £5 a share, which I am rather disposed to think would have been sufficient. However, no such course was taken, and the parties got angry, and in order to decide this mere dry point of law, what was the right of the directors to veto the transfer of shares, they have carried on the litigation to the utmost extent, and they even persisted in having a question of no importance decided as to who was the person to be sued. They chose to sue two directors, and I decided that they might sue either the secretary or one of the directors, and at last they selected Mr. *Farquhar*, who now stands as the representative of the company. All this litigation was very unreasonable and very useless.

Now, in this state of feeling, Mr. *Moffatt* finding that he had only twenty votes for his 3031 shares, Mr. *Wythes* having no more than twenty votes for a still larger number, and Mr. *Clive* also being limited to twenty votes, amounting to no more than sixty votes among them, it occurred to Mr. *Moffatt* and the others that they were not properly represented upon any division of opinion,

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and that by selling their shares, or transferring them to trustees for themselves, the power of voting might be increased. Accordingly Mr. *Moffatt* sold to Mr. *Roger Eykyn*, a gentleman well known to be of the highest respectability, a stockbroker, and formerly a member of Parliament, to whom it was impossible that any objection could be raised, 400 shares. It was suggested that this was not a *bonâ fide* sale, but a transfer by way of trust; but Mr. *Eykyn* was examined as a witness and swore that he desired to be a member of the company, and that he was ready to pay the money for the shares. I am bound, therefore, to take this as a *bonâ fide* sale of 400 shares at the price of £8 per share. Upon this sale taking place there was the usual notice given to the directors that Mr. *Moffatt* was desirous of transferring these shares to Mr. *Eykyn*, and he also gave them notice that he was desirous of transferring 400 other shares to Mr. *R. Moffatt*. The result of the evidence given by Mr. *R. Moffatt* is to shew that he was not to pay for them, but to hold the shares in trust for his uncle, the Plaintiff; therefore I have a transfer of 400 shares for value at the full market price, and a transfer of 400 shares voluntarily to a trustee for the Plaintiff, Mr. *Moffatt*.

To these transfers the directors have objected, and the only objection they raise is, not to the persons, because it is admitted by Mr. *Round* that there is no objection as to the fitness of the persons, but another objection is raised. Mr. *Round* says it was this—that the interest in the shares was not wholly parted with; but that objection, as regards Mr. *Eykyn*, entirely fails, because the evidence is all one way, and what Mr. *Eykyn* says is not attempted to be denied, and nobody will say that Mr. *Eykyn* was not as good a member of the company as they could desire to have. With regard to the other person, the reason for refusing the transfer was the same—that the interest was not wholly parted with, and to that extent they had some ground for their decision. But the real objection to the transfers has been, not to the fitness of the persons, but merely to the object with which the transfers were made; that is to say, the directors have thought fit to conjecture, —and they had no right to be guided by any such consideration— but they conjectured that the object of selling the shares to Mr. *Eykyn* and Mr. *R. Moffatt* was to get friendly transferees who

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would take the shares, and who would vote in accordance with the views of Mr. *Moffatt* himself.

The question therefore raised, and the only question that I have to decide, is, what is the power of the directors in vetoing or forbidding the transfer of the shares? Now that entirely depends upon the 82nd clause of the deed of settlement of the company.

The only power which is given by that section to the directors of objecting to the transfer is as to the person of the transferee. If the person or persons proposed shall be approved of, then a transfer of the shares is to take place. In my opinion, therefore, it is perfectly clear there can be no justification for refusing the transfer unless they have an objection to the person of the transferee. That they should have such a power seems reasonable; because, this being a limited company, and it being very desirable that they should have respectable men and solvent men as members, and persons who would be able to pay the calls which should be made, it is reasonable that they should have the power of objecting to the person, and not have introduced among them insolvent persons, or, it might be, if you like, disagreeable persons who would throw them into confusion; and therefore the directors have the power of objecting to the person. Certainly, there is, in my opinion, no other power of objecting to the transfer, and if, therefore, a proper transferee is proposed, I take it to be perfectly clear that the proprietor has a right to transfer his shares to whomsoever he likes, and the board has no right whatever to inquire into what the object of that transfer is.

Now this is most important; because here is a case, in which the nominal value of the Plaintiff's shares in this company amounts to £60,000. This right of transfer is a right of property; and if the directors have an arbitrary power, from any fancy they choose to take up, to say there shall be no transfer, that is an annihilation of property. A man may have embarked too much in becoming a member of the company, and in a case of emergency he may require to sell his shares fairly in the market to a person of unexceptionable character; but if the directors have the power of vetoing the transfer because they conjecture there is some collateral object, the value of the property is diminished—the marketable value is gone; and therefore the transfer in these

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joint stock companies is a right of property, which right of property must not and cannot be lightly interfered with. Such are the views which have been taken in all the cases that have occurred. It is always treated as a matter of property; and where a matter of property is concerned it must not be lightly interfered with. That is distinctly pointed out in *Poole* v. *Middleton* (1). The point in that case was this: "It was provided by the deed of settlement of a joint stock company 'that no shareholder should be at liberty to transfer his shares, except in such manner as a board of directors should approve.' A shareholder contracted to sell his shares, and it was held that he was bound specifically to perform the contract, by the execution of a transfer, though the directors refused to allow it." In that case there is a passage that is very applicable to this case. Lord *Romilly* says (2): "But shares in joint stock companies which do not belong to any of the directors, are perfectly distinct from such cases; they are, in fact, in the nature of property, and according to the ordinary rule every person possessed of property has a right, by law, to dispose of it, except to the extent that he may be fettered by any contract which diminishes or derogates from that right. Therefore, unless there is something which prevents him from entering into such a contract, he has a right to dispose of his property in any share in a joint stock company, which is a right to receive the dividends."

Now, the board having been applied to to make these transfers, they passed the resolution which is set out in the statement of claim, and admitted by the statement of defence, and by which they say that having duly considered the proposals they do not approve of the same. The statement of claim alleges that the said resolution was passed by the directors, not in a *bonâ fide* exercise of their discretion or for the interests of the company, but solely for their own private purposes, and in pursuance of and to carry out their aforesaid determination; that the directors had not and never have had any grounds of objection to the proposed transferees personally, who were in every respect fit and proper persons to be proprietors of the shares in the said company proposed to be transferred to them. Then the Defendants state what

(1) 29 Beav. 646. (2) 29 Beav. 650.

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their objection to the transfer was. "At a meeting of the board of directors held on the 7th day of December, 1875, they duly considered the two last mentioned applications, and believing the said transfers to be intended merely as transfers in trust for the Plaintiff." Why a man should not transfer his shares to a trustee for himself, I confess I am utterly unable to see. A man may say that on 3000 shares there will be very heavy calls; if he got a person to stand in his place to hold them upon trust for him, why should not the man be at liberty to transfer his shares to a trustee in trust for himself as much as he would be to transfer any other property he had? A man has a right to transfer his personal estate of every description into the name of another person to hold it in trust for him, but these directors took this most extraordinary and, to my mind, most unjustifiable view, that they were transfers in trust for the Plaintiff; and now comes the real objection: "And for the purpose of enabling the Plaintiff to have the command of forty additional votes, they refused to approve of such transfers." The Plaintiff afterwards inquired as to the reason for such refusal, and the directors stated that the decision they had come to was in the interests of the company.

The Defendants state that the Plaintiff had never alleged that the proposed transfers were on sales actually made in the ordinary course, and were not mere transfers in trust for the Plaintiff.

In my opinion it is not necessary for him to deny that.

Now, that is the whole point between the parties. The Plaintiff says he has an absolute right to transfer, provided the person is unobjectionable. The Defendants say that they have a right to consider, first, whether that is a transfer in trust for the transferor, and, secondly, what the object of the transfer was. My opinion is that they have no right whatever to inquire as to the object of the transfer, provided the transferees are persons who are unobjectionable, as they are admitted here to be; and they have attempted to usurp a power which certainly, in my opinion, does not belong to them.

A further objection was raised in argument, which I confess somewhat surprised me should be resorted to. It was said that this was not a joint stock company, but a private partnership. I think that Mr. *Higgins* has completely met that point. Even if it

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were a private partnership, the parties have agreed—and it is competent for them to do so—that a new partner shall be introduced without the consent of all the partners. It is no doubt very convenient, and I have seen it in many instances provided, that a partner shall have liberty to introduce a son, or a nephew, or some relative, and if his partner has agreed to that, he is bound by it, because he has agreed that a new partner may be introduced without the consent of all the other partners.

The case of *Lovegrove* v. *Nelson*, which was mentioned to me this morning, and which is cited by Mr. Justice *Lindley* (1), decided that if the partners agreed that one partner should bring in a new partner without the consent of all, that was just as binding upon them as if they were a public company.

This company describes itself as a company, and it has all the liabilities of a company. It is a public company, in which the shares are bought and sold by auction or otherwise, and in which the right of transfer has been exercised for thirty-five years, to a very great extent, and no attempt has been made to raise any objection to the transfers, except as to the person of the transferee, up to the present time.

Mr. *Higgins* is quite right in saying that by the deed of settlement this is a company, and it is so by their private Act of Parliament obtained by the company itself, and by the definition in the 7 & 8 Vict. c. 110, under which Act this very company was registered. The definition of a company in the 2nd section of that Act is this: "Every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners." This, therefore, beyond all doubt, to my mind, is a joint stock company, to which all the provisions of the *Joint Stock Companies Act* are applicable.

Now, with regard to the principles which have been established by the numerous authorities that have been cited, the first one relied upon on the part of the Plaintiff was the case of the *Stranton Iron Company* (2), a decision of Vice-Chancellor *Bacon*. The very circumstances which existed in that case exist here. The shares were paid up in full. Here they are not quite paid up in

(1) Lindley on Partnership, 3rd Ed. p. 719.
(2) Law Rep. 16 Eq. 559.

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full. That is the only difference. In the *Stranton Iron Company* the *Crédit Foncier* were the holders of a great number of shares; but as matters then stood in respect of those shares, at a meeting which was about to take place they could only have 100 votes. They desired to multiply their votes. They did not think that they had votes enough to represent their interest, and therefore a meeting having been called for the 28th of July, on the 23rd of July the *Crédit Foncier* executed the nine transfer deeds mentioned in the form suggested by the articles of association of 100 shares each to nine persons, and on the same day the deeds were left at the company's office for registration with the share certificates, and the fees were paid, but shortly afterwards the deeds were returned by the secretary with a verbal message that under the circumstances he could not register the transfers. The transferees were the solicitors, and several clerks in the employ of the *Crédit Foncier*. A correspondence followed, but registration was refused; and this motion was made on Saturday the 26th of July, the meeting being summoned for the 28th of July, the following Monday, and it was therefore of great importance to the *Crédit Foncier* that these transfers should be registered, otherwise they would only have the 100 votes which were limited to every shareholder. Vice-Chancellor *Bacon* said this (1): "In my opinion I cannot refuse to make the order which is asked. The applicants are the owners of shares—a class of property of which one of the incidents is a right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register that transfer, or to furnish some reason for refusing to transfer." Then he says that no ground whatever had been assigned which would excuse non-registration except a desire to exclude the applicants from the exercise of that which was their plain legal right, and he not only grants the application to have the shares registered, but directs them to be registered before the following Monday, when the meeting was to be held, on the ground that if the application were not granted in that shape the sole object for which the transfers were made would be frustrated. Now there the transfer was enforced, although the avowed object was to increase the voting power in respect of the shares transferred.

(1) Law Rep. 16 Eq. 562.

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Then, as to the case of *Robinson* v. *Chartered Bank* (1), the company refused to allow the transfer, but the Court held, as it does in all these cases, that the company must exercise their power in a reasonable manner, and, there being no reasonable ground alleged there for refusing the transfer, they were compelled to allow it to take place.

There are other cases in which the directors have attempted to do the same thing. For instance, there is *Weston's Case* (2), in which the Lords Justices refused to allow an objection to the transfer, because the transferee was supposed to have given an erroneous address. The Court held that he had given a sufficient address, and therefore they compelled the transfer to be made. In that case, which is a very important one, Sir *William Page Wood*, then Lord Justice, in stating his reasons, says this (3): "I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibility at any time they please by going into the market and disposing of and transferring their shares without the consent of directors, or shareholders, or anybody, provided only it is a *bonâ fide* transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited powers of assignment shall not exist, then a clause is inserted in the articles by which the directors have powers of rejection of members. *Shortridge* v. *Bosanquet* (4), which went to the House of Lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the *Companies Act*, 1862, in the 22nd section, gives a power of transferring shares." Then he says: "It would be a very serious thing for shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable, and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles, and I may add that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would

(1) Law Rep. 1 Eq. 32.
(2) Ibid. 4 Ch. 20.
(3) Law Rep. 4 Ch. 27.
(4) 16 Beav. 84; 5 H. L. C. 297.

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impose upon them much more onerous duties than any which are really imposed upon them by this clause." That fully recognises the right of every shareholder, in respect of his right of property, to transfer his shares fairly and without any restraint on the part of the directors.

The case of *Ex parte Penney* (1) appeared to me at first the case most strongly in favour of the contention of the Defendants. However, upon looking at it, I think it will be found to be very distinguishable from this. The 17th clause—the one which affects the question—is this: "That subject to the provisions herein contained, and subject also to the provisions of the *Joint Stock Companies Act*, so long as the company shall be subject to the provisions of that Act every shareholder shall be at liberty to sell and transfer his shares to any other person who shall already be a shareholder, or who shall have been approved of as such by the board of directors." The question was whether the directors had a right to prevent a transfer of shares to Mr. *Penney*, who was not yet a transferee, or to a person who should have been approved of as such by the board of directors. Therefore here there was power of objecting to the person, and the directors objected to the transfer to Mr. *Penney*. They did not state any reason, and therefore the Court said, We must assume that the objection, which alone is the objection they are entitled to make, is an objection to the person of the transferee; but if they had given another reason—that Mr. *Penney* was to be trustee for the transferor—I think it is perfectly clear from what both Lords Justices said, they would not have considered that a valid objection to the transfer. If it had been avowed that it was not an objection to the person of the transferee, but that the transferor would vote in a particular manner after the transfer was made, it is quite clear, from all that fell from the Lords Justices, they would have considered that wholly unjustifiable. This is the passage which has been read (2): "If the directors had been minded, and the Court was satisfied that they were minded, whether they expressed it or not, positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose"—which is the condi-

(1) Law Rep. 8 Ch. 446. (2) Law Rep. 8 Ch. 449, 451.

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tion here that they are to vote in accordance with their views—"the Court would probably, in exercise of its duty as between the *cestui que trust* and the trustees, interfere to redress the mischief either by compelling the transfer or giving damages, or in some mode or other to redress the mischief which the shareholder would have had a just right to complain of." Lord Justice *Mellish* also says: "I am disposed to think, although it is not necessary distinctly to decide it in this case, that if it were made out that the directors were committing a breach of trust towards any one of their shareholders in refusing to allow him to transfer his shares for a purely arbitrary reason, that might be a ground why the Court should interfere." Here I consider that the directors are refusing for a purely arbitrary reason. They choose to adopt a particular view as to the manner in which this company shall be converted from an unlimited to a limited company, and unless every shareholder will concur in their views they arbitrarily set up a standard upon which he is allowed to deal with property of this enormous value, and unless he concurs in their particular views no transfer is to be made. That is a contention which, in my opinion, cannot be set up in a Court of Justice, and it is wholly unsupported by any case that is to be found in the books. The case I have been referring to at first rather struck me, but upon looking at the reasons given by the Court, I come distinctly to the conclusion that if such a reason as this had been before them, they would have decided as I am about to decide in the present case.

Those are the only cases of any importance to which it is necessary to refer, except the last case of *Pender* v. *Lushington* (1), in which the present Master of the Rolls has, in effect, decided the very point which I am now called upon to decide, viz., that it is no objection to the transfer of shares, whether the object of the transfer is known before it takes place, as it was in the *Stranton Ironworks* case, before Vice-Chancellor *Bacon*, or whether when the transfers have been made it is ascertained that they were made for the purpose of multiplying votes—it is equally free from objection, and those who have obtained their right of voting in this manner cannot in any way be objected to.

(1) 6 Ch. D. 70.

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The case which gave rise to the decision in *Pender* v. *Lushington* (1) was this, it was as to the *United States Cable Company, Limited*, of which Mr. *Pender* was a director. He took a particular view, and the other members of the board took another view, with regard to certain regulations of the company. Those that agreed with Mr. *Pender* found that they had not power enough to carry their view, because, though they held a larger number of shares, they were restricted as to the number of votes they could give. They, therefore, found it was impossible to carry their views unless they could multiply their votes, so they made numerous transfers for the very purpose of multiplying their votes. A public meeting having taken place they proceeded to vote, and the chairman who presided rejected the votes of all those whose shares had been transferred by shareholders taking the opposite view, on the ground that they had been transferred for the express purpose of multiplying votes. If that objection could have been sustained, then Mr. *Pender* was beaten, but if Mr. *Pender* could have the use of those votes, then his view was carried. That is the point that was brought before the Master of the Rolls upon the question whether these votes were properly rejected by the chairman as having taken place for the purpose of multiplying votes. A motion was now made on the behalf of the Plaintiff, Mr. *Pender*, and those who sided with him, to restrain the Defendants from ruling out the 649 votes—that is, rejecting 649 votes which had been obtained in the manner I have stated—until the hearing of the action. The Master of the Rolls felt no more doubt in that case than I do in the present. I confess I have not been able from the first hour this case was opened to bring my mind to the slightest doubt as to the conclusion at which I ought to arrive. The Master of the Rolls says (2): "In all cases of this kind where men exercise their rights of property they exercise those rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise." I expressed my surprise that Mr. *Round*, a gentleman of experience, could have thought and advised this company that they had any right to object to this

(1) 6 Ch. D. 70. (2) 6 Ch. D. 75.

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transfer into the name of Mr. *Roger Eykyn;* and Mr. *Round* founds his objection upon a conjecture, when he had no right to conjecture upon the subject at all, that the whole interest was not parted with, when it is laid down here (1): "The result appears to be manifest that the company has no right whatever to enter into the question of the beneficial ownership of the shares. Any such suggestion is quite inadmissible; and therefore it is clear that the chairman had no right to inquire who was the beneficial owner of the shares, and the votes in question ought to have been admitted as good votes independently of any inquiry as to whether the parties tendering them were or were not, and to what extent, trustees for other persons beneficially entitled to the shares."

Now, independently of the very strong views which I entertain myself of the right of every shareholder in a joint stock company, as a matter of property, to protect that property from being interfered with, I have first of all the decision of Vice-Chancellor *Bacon* in *In re Stranton Iron Company* (2), that where the transfer was about to be made for the express purpose of multiplying votes—that transfer could not on that ground be refused; and I have also the very recent decision of the Master of the Rolls in *Pender* v. *Lushington* (3), that where the shares were transferred for the same object no objection could be made to the votes that were given in respect of those shares. So that I am warranted in coming to the conclusion, as I do most distinctly, that the objection raised by these directors to this transfer was without justification, and I am bound, therefore, to order that the transfers to Mr. *Roger Eykyn* and Mr. *Robert Moffatt*, in pursuance of the notice of the 29th of November, 1875, be made.

That, therefore, is the conclusion that I arrive at, and that will be the decree.

The consequence must be that the contest raised by the company fails. I have already said that Mr. *Farquhar* represents the company, and the result of it is that Mr. *Moffatt* must have his costs paid by the company.

Another very important question is raised whether there should be an inquiry as to damages. I do not know whether it is

(1) 6 Ch. D. 78. (2) Law Rep. 16 Eq. 559.
(3) 6 Ch. D. 70.

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desired to press that. I should strongly desire that the litigation should stop here as far as I am concerned. V.-C. M. 1878 MOFFATT v. FARQUHAR.

Jan. 28. The case was again mentioned. An offer to waive the inquiry was made on conditions, which were not accepted, and the Vice-Chancellor then directed an inquiry as to damages.

Solicitors for Plaintiff: *Hollams, Son, & Coward.*
Solicitors for Defendant: *Freshfields & Williams.*

In re KEARLEY AND CLAYTON'S CONTRACT.

V.-C. M. 1878 *Feb.* 2.

Vendor and Purchaser Act, 1874—*Vendor's Liquidation in Bankruptcy—Composition—Evidence of Payment of Instalments.*

A debtor who has filed a petition for liquidation in bankruptcy and has effected a composition with his creditors, has complete dominion over his property, and full power to dispose of it until, upon action taken by his creditors under the *Bankruptcy Act*, 1869, s. 126, the composition has been set aside and the debtor adjudged a bankrupt; and a purchaser from him is not bound to inquire as to the payment of instalments under the composition.

Statement.

THIS was a summons taken out under the *Vendor and Purchaser Act*, 1874, upon an application on the part of *Ewbank Kearley*, the vendor, in respect of requisitions or objections made by the purchaser, *Alfred Clayton*, whereby he required the evidence of payment of composition to creditors under the vendor's liquidation in bankruptcy, that it might be held that the said *Ewbank Kearley* was able to make a good title to the hereditaments mentioned in the contract without such evidence, and that the purchaser might be ordered to accept such title from the vendor accordingly.

On the 13th of September, 1876, the vendor filed a petition for liquidation. The first meeting of creditors was held under such petition on the 12th of October, when resolutions were passed by the statutory majority of creditors for a composition of 12*s.* 6*d.* in the pound, by three instalments of 5*s.* at three months, 2*s.* 6*d.* at six months, and 5*s.* at nine months, the last two instalments to be secured to the satisfaction of *W. Banks*, and promissory notes given

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for such instalments. At the second meeting, on the 26th of October, that resolution was confirmed. After the resolutions had been passed by the creditors two of the largest creditors filed an objection to the registration of the resolutions, on the ground that the second and third instalments of the composition had not been secured to their satisfaction, and thereupon an undertaking or security was given by two sureties for the payment of the two last-mentioned instalments.

Statement.

The property comprised in the contract for sale was, with other property, included in an indenture of mortgage for £3000, dated the 8th of December, 1874, from *E. Kearley* to Messrs. *Browse & Waterman;* and in the month of August, 1876, *Kearley* arranged to transfer the said mortgage to the *Land Securities Company*, but the transfer was not completed till the 30th of November, 1876, when the company paid off Messrs. *Browse & Waterman*, who thereupon executed the usual transfer. It was part of the understood terms between *E. Kearley* and the company that if and when *E. Kearley* desired to sell any portion of the property comprised in the transfer of mortgage they would concur in the sale. The contract now entered into with *Alfred Clayton* was dated the 19th of March, 1877, by which *E. Kearley* agreed to sell certain freehold property comprised in the before-mentioned mortgage to *A. Clayton* for the sum of £1500.

The purchaser was willing to complete if a good title could be made.

Argument.

H. B. Buckley, for the vendor:—

The effect of a composition entered into by a debtor and accepted by his creditors is to leave the debtor in possession of his property; he has complete dominion over it, and may sell it or charge it in any manner he pleases. This is the very intention of a compromise, to enable the debtor to dispose of his property to the best advantage so as to realize the amount he has compounded to pay his creditors. Composition differs from liquidation in this essential point, that the object is to leave the debtor free to deal with his property as he pleases. This principle was laid down in *Ex parte Hoare* (1), *Ex parte Jones* (2), *Ex parte Burrell* (3),

(1) Law Rep. 16 Eq. 625. (2) Law Rep. 10 Ch. 663.
(3) 1 Ch. D. 537.

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and in *Ex parte Jameson* (1). The 126th section of the *Bankruptcy Act*, 1869, gives the Court power, under certain circumstances, to adjudge the debtor a bankrupt, but till that is done he is as free as if he had never presented a petition in bankruptcy.

Argument.

De Castro, for the purchaser:—

We are, in the first place, entitled to proper evidence that the first instalment of 5*s.* in the pound was paid to all the creditors. Secondly: There appears to be reason to doubt whether the two last instalments of 2*s.* 6*d.* and 5*s.* in the pound have been secured in accordance with the terms of the resolutions. Default in this respect would operate as an act of bankruptcy, which is available against the debtor for adjudication within the meaning of the 126th section of the *Bankruptcy Act*, 1869. This was laid down in *Ex parte Charlton* (2). The filing of a liquidation petition, whether for a liquidation by arrangement or by composition, is an act of bankruptcy. It is the payment or satisfaction of the composition, and not the mere resolutions agreeing to accept one, which operates as an extinguishment of the debts. On default being made in payment of any instalment, the original debts revive so as to give the creditors their remedies in bankruptcy. The purchaser cannot safely complete his purchase until the instalments in composition are paid in accordance with the terms of the resolutions, as he would otherwise be completing his purchase with notice of an act of bankruptcy by the vendor still available against him for adjudication. We are bound to see that the money has been paid in pursuance of the terms of the composition. We cannot safely pay the defaulting party, and there is at present no person who can give a valid discharge to a purchaser for his purchase-money, or make a good title to the land.

Judgment.

MALINS, V.C.:—

This is a very important point affecting the rights of persons in pecuniary difficulties. This contract was entered into in March, 1877, between *Kearley* and *Clayton*, by which *Kearley* sold certain property to *Clayton*. The title is admitted to be a good title in all respects, except on this point, which is, that *Kearley*, in Sep-

(1) 3 Ch. D. 488. (2) 6 Ch. D. 45.

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tember, 1876, filed a petition for liquidation in bankruptcy, which resulted in a composition being accepted by his creditors. The resolution for accepting this composition was finally passed in October, 1876. The contract now in question is dated the 19th of March, 1877, and consequently it was within six months of the final resolution. The question now is, whether within the six months the debtor remained the master of his own property, or whether the liquidation deprived him of the power of alienation. The purchaser contends that although it might not have deprived him of all power over his property, it is necessary, in order to settle that question, to ascertain whether the composition was duly paid when it became due, because it is said if failure was made in payment, then the creditors have an option of making him bankrupt; or whether, in accepting a composition, they do not leave him in control of his property in order to dispose of it and to pay the composition, for if not, he would be deprived of the means of paying. Suppose he enters into a composition and does not pay, the remedy is given by the 126th section of the *Bankruptcy Act*, 1869, which says: "If it appear to the Court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors, or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly." Therefore, in this case, if the debtor fails to fulfil his engagement the creditors could make it the subject of an application to the Court to adjudge the debtor a bankrupt. My interpretation is, that it may be made the foundation at any time of proceedings for a bankruptcy, but till then he remains master of his own property. It leaves him with the dominion over his property till the creditors move; he is master of his property, and the purchaser has no right to make inquiries on the subject of composition. Looking at the Act of Parliament, these are the conclusions I should arrive at, but there are decisions of Vice-Chancellor *Bacon* and of the Appeal Court, all of which go upon the same principle—that the effect of a composition is to leave him the dominion over his own property. In the case of *Ex parte Hoare* (1) the question was whether a mortgage executed

(1) Law Rep. 16 Eq. 625, 628.

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within six months of the filing of a liquidation petition was valid, and the Chief Judge said, "Though Mrs. *Hoare* when she took her mortgage had notice of the act of bankruptcy, she had also notice of the resolution of the creditors to accept a composition, the result of which was to leave the debtor the master of his property." And he says that what had been done was done at a time when the debtor, with the consent of all his creditors, was a perfectly free agent. That decision related to a mortgage, but if a mortgage was good, a sale would be equally good.

That was followed by *Ex parte Jones* (1), which was decided upon the same principle; and it was there held that a resolution for composition had no retrospective effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting of creditors; and Lord Justice *James* said: "If the petition had resulted in a bankruptcy or liquidation, no doubt the right of the creditors would have been lost, because the goods would have been, not the goods of the debtor, but the goods of the trustee. But in a composition the goods of the debtor do not cease to be his goods—that is of the very essence of a composition."

The case of *Ex parte Burrell* (2) is to the same effect—that there is nothing to prevent a compounding debtor from doing whatever he likes with the assets. He is absolute master of those assets in exactly the same way as any purchaser who has bought the assets and given his acceptances for them. Mr. Justice *Mellor* said this: "It seems to follow the ordinary rule of an ordinary composition, in which by the bargain made with the debtor, he is released and becomes a free man, unless there is something special in the circumstances—some fraud or misappropriation."

The only case cited by Mr. *De Castro* is that of *Ex parte Charlton* (3), which proceeds on this—that non-fulfilment of a composition is a ground for the Court to exercise a discretionary power under the 126th section of the *Bankruptcy Act*, 1869, to adjudge a compounding creditor a bankrupt. That does not interfere with those decisions which I have referred to. All the authorities, therefore, go on the same principle.

(1) Law Rep. 10 Ch. 663, 665. (2) 1 Ch. D. 537, 553.
(3) 6 Ch. D. 45.

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The composition leaves the man who compounds, though he may not have paid all his dividends, complete master of his property. I think, therefore, that the vendor when he entered into this contract was master of his property just the same as if no composition had been entered into, and that the title is a good one. The purchaser is not, in my opinion, entitled to any evidence whether the composition has been complied with or not. Until the creditors have taken action under the 126th section to set aside the composition there is no bankruptcy; there is a continuous right to take proceedings in certain events, but till they do so the person compounding is left as he was before the petition in bankruptcy.

The declaration will, therefore, be, that the title is good, and that the purchaser is not entitled to evidence of compliance with the terms of composition, on the ground that until the creditors in the Court of Bankruptcy, on the creditors' motion, take action for breach or default, there is no act of bankruptcy available against the debtor for adjudication.

By arrangement no order was made as to costs.

Solicitors: *Munton & Morris; Bircham & Co.*

V.-C. M. 1878 *Feb. 7.*

MANSON *v.* THACKER.

[1874 M. 12.]

Vendor and Purchaser—Misrepresentation—Compensation—Completion of Purchase—Execution of Conveyance.

A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance.

Bos v. *Helsham* (1) considered.

Statement.

THIS was an application by the purchaser of property known as *Norway Wharf, Bermondsey Wall*, sold under a decree in these suits, for compensation in respect of the existence of an under-

(1) Law Rep. 2 Ex. 72.

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ground culvert not discovered by the particulars of sale, through which certain third parties had a right to the flow of water.

The property was sold by public auction under the decree made in the suit, for £4960. In the particulars of sale the property was described as "available" as a building site for a warehouse or granary, and the 16th condition of sale provided "that if any error or misstatement should appear to have been made in the above particulars, such error or misstatement was not to annul the sale or to entitle any purchaser to be discharged from his purchase, but compensation was to be made to or by the purchaser, as the case might be, and the amount of such compensation was to be settled by a Judge at Chambers."

Statement.

The title was investigated on behalf of the purchaser and was accepted by him, and in due course he paid his purchase-money into Court, and took his conveyance in February, 1877.

Evidence was given that on July 1, 1877, the purchaser (for the first time, as he stated) discovered the culvert, and found afterwards that he had no right to interfere with it.

On the 9th of July the purchaser's solicitors gave the Plaintiff's solicitors notice of his claim for compensation, and required them not to proceed with the distribution of the purchase-money under a decree which had been made in the suit. Evidence was given that the diminution in value, owing to the existence of the culvert, was estimated at £865.

The evidence proved that the mouth of the culvert was only visible at low water.

A summons was taken out, before the Vice-Chancellor in Chambers, for compensation, but his Lordship dismissed the summons, and the case now came on upon an adjourned summons.

Higgins, Q.C., and *Laing*, for the purchaser:—

Argument.

In this case the purchaser is entitled to compensation, notwithstanding the completion of the purchase. He would have been entitled to rescind in the absence of the condition: *Caballero* v. *Henty* (1); *Shackleton* v. *Sutcliffe* (2); and *King* v. *Wilson* (3); and where there has been material misdescription the completion of

(1) Law Rep. 9 Ch. 447. (2) 1 De G. & Sm. 609.
(3) 6 Beav. 124.

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Argument.

the purchase is no bar to compensation: *Cann* v. *Cann* (1); *Bos* v. *Helsham* (2). The purchase-money being in Court, compensation can be paid out of it.

Caballero v. *Henty* (3) shews that specific performance could not be enforced: *Shackleton* v. *Sutcliffe* (4); *Dart's* Vendors and Purchasers (5); *Newcomin* v. *Coulson* (V.-C. M. Jan. 18, 1877); *Gale* on Easements (6).

J. Pearson, Q.C., and *Whitehead*, for the vendors:—

Right to compensation is gone after execution of conveyance: *Legge* v. *Croker* (7). The purchaser ought to have discovered this defect. It was his duty to make every inquiry before completing: *Wilde* v. *Gibson* (8); *Hart* v. *Swaine* (9). If this was an objection, it has been waived.

Glasse, Q.C., and *Macnaghten*, for Defendants in the suit.

Higgins, in reply:—

There may be compensation after conveyance where the question is one of parcels and subject-matter only, for as to these a purchaser need not inquire: *Cann* v. *Cann*; *Cooper* v. *Cooper* (10); *Bos* v. *Helsham*.

In *Lane* v. *Flower*, before your Lordship on the 1st of June, 1876, your Lordship held that a purchaser ought to make inquiries as to the subject-matter, but the Court of Appeal took a different view.

In *Thomas* v. *Powell* (11) there was a mere question of title, as to which, in the absence of fraud, there must be an end of the matter when the title is accepted.

Lord *St. Leonards*, in his Vendors and Purchasers (12), remarks on the above cases and on *McCullock* v. *Gregory* (13).

[MALINS, V.C., referred to *O'Kill* v. *Whittaker* (14), where the

(1) 3 Sim. 447.
(2) Law Rep. 2 Ex. 72.
(3) Ibid. 9 Ch. 447.
(4) 1 De G. & Sm. 609.
(5) 5th Ed. p. 662.
(6) 5th Ed. p. 545.
(7) 1 Ball. & Bea. 506.
(8) 1 H. L. C. 605.
(9) *Ante*, p. 42.
(10) 4 Ir. Ch. Rep. 75.
(11) 2 Cox, 394.
(12) Page 551.
(13) 3 Eq. Rep. 495.
(14) 2 Ph. 338.

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vendor sought to obtain an additional price on the ground that twenty years of his lease were unexpired, and not eight only, as had been supposed, but no relief was given.]

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We contend that a misrepresentation as to the subject-matter differs from a misrepresentation as to title, and that we are entitled to compensation.

MALINS, V.C., after stating the facts, continued:—

Judgment.

I apprehend that upon every principle the purchaser, having investigated the title and looked at the property, must be taken to have been satisfied. I do not express any opinion as to whether he might not have been entitled to compensation, or even to rescind his contract, if he had discovered the culvert before he completed his purchase. But the purchaser here has had ample opportunity of examining the property, for there was no concealment, and he ought to have discovered this defect before he completed his purchase. If this power to claim compensation is to be carried on indefinitely, it will follow that a vendor will never be discharged from liability; he will always be liable to pay compensation after he may have applied the purchase-money for other purposes. Nor are the cases in favour of the purchaser. Even *Thomas* v. *Powell* (1) is against him, where the purchase-money had not been appropriated, the sale having been under a decree; and I take it to be clear that even if the purchaser had been evicted from the whole estate the decision would have been the same. If, then, the Court will not relieve when the whole estate is lost, it surely will not give compensation for a defect. Lord *St. Leonards*, in his Vendors and Purchasers (2), says that if the conveyance has been executed the purchaser cannot recover his purchase-money, either at law or in equity; and Mr. *Dart* and the other authorities are to the same effect.

It is true there is some doubt arising from the case of *Cann* v. *Cann* (3), decided by Vice-Chancellor *Shadwell*, a very experienced property lawyer; but that case, in my opinion, can only be supported on the ground that the representation, which turned out to

(1) 2 Cox, 394.

(2) 14th Ed. p. 549.

(3) 3 Sim. 447.

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be untrue, ought never to have been made by the vendor, and amounted, in the view of the Court, to a species of fraudulent misrepresentation. In *Bos* v. *Helsham* (1) the Court decided that a misrepresentation as to rental was a proper subject of compensation, though not discovered until after the execution of the conveyance. But there, also, the vendor was, in the opinion of the Court, guilty of a fraud. No doubt the Judges, in their judgments, considered that the condition as to compensation applied to errors discovered after, as well as before, the completion of the purchase. But that, in my opinion, is not the law of this Court; and, with all respect to those Judges, I must hold that the same view would not have been taken in this Court.

In *Legge* v. *Croker* (2) a right of way was discovered over leased property after the execution of the lease, and the decision was that the claim for relief was too late, although the lessor had stated that there was no such right of way.

The other cases which were cited by Mr. *Higgins*, *Caballero* v. *Henty* (3), *Shackleton* v. *Sutcliffe* (4), and *King* v. *Wilson* (5), were cases of objection to the title before completion, and have no application to this case.

In *Lane* v. *Flower*, heard before me on the 1st of June, 1876, Mr. *Beyfus*, a gentleman of great experience, and frequently in the habit of buying property, purchased at an auction a house stated in the particulars to be let at £33 per annum at about ten years' purchase. It was not stated in the particulars that the house bringing £33 per annum was let only on weekly tenancies; so that the purchaser would have to pay taxes which the tenants, if they had been yearly tenants, would have had to pay; and it was stated, as to other lots, that they were held on weekly tenancies. Mr. *Beyfus* claimed compensation, on the ground of the property he had purchased being held on weekly tenancies; but I refused him any compensation, on the ground that he might have found out the truth at the time, and also because an offer had been made by the vendor to put Mr. *Beyfus* in the same position as if the mistake had not been made. Subsequently the matter was taken

(1) Law Rep. 2 Ex. 72.
(2) 1 Ball. & Bea. 506.
(3) Law Rep. 9 Ch. 447.
(4) 1 De G. & Sm. 609.
(5) 6 Beav. 124.

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to the Court of Appeal, and the Judges adopted the view that compensation ought to be given, but no decision was given, as the parties came to a compromise. That was a case, however, where the mistake was discovered before the conveyance was executed, and has no application here. No doubt, if there has been a fraudulent misrepresentation on the part of the vendor there may be compensation, even after completion. Thus, in *Hart* v. *Swaine* (1), before Mr. Justice *Fry*, where there was legal fraud, that vitiated the whole transaction. Here fraud is not charged. I must dismiss the motion with costs.

Solicitors: *Parker & Clarke; Thomas D. Francis; Burton, Yeates, & Hart.*

WATSON *v.* RODWELL.

V.-C. M. 1878 *Feb.* 12, 13, 18, 19, 20.

[1876 W. 103.]

Solicitor and Client—Settled Account—Costs—Taxation—After Payment—Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 41—*Special Circumstances—Overcharges.*

An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the ground, 1, of undue influence, 2, that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done.

Statement.

THIS was an action by a widow aged seventy-seven against her solicitor, seeking to open a settled account dated the 22nd of May, 1874, and to tax bills of costs which had been paid more than a year before the institution of the suit under the following circumstances:—

William Watson, the Plaintiff's husband, by his will, dated in 1861, appointed the Plaintiff and *J. Wilson* executrix and executor, and devised and bequeathed his property, which consisted only of leaseholds and shares in the *London Joint Stock Bank*, to his wife, the Plaintiff; but on the construction of the will it was not clear what interest she took, whether absolute or for life only. Her

(1) *Ante*, p. 42.

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sister, Mrs. *Woodman*, took an annuity under the will, and Mrs. *Woodman's* children took a contingent remainder in the leaseholds if the construction that the widow took only a life interest was correct.

William Watson died in 1872, and an administration suit of *Watson* v. *Wilson* was instituted by the Plaintiff on the 7th of June, 1872, for the purpose of deciding the questions of construction arising upon the will, Messrs. *Kimber & Ellis* being the solicitors.

On the 28th of November, 1872, a suit was instituted by *Walter Woodman*, one of Mrs. *Woodman's* children, for administration of the same estate, and seeking to restrain the Plaintiff from dealing with the property of the testator as if it belonged to her absolutely. It appeared by the evidence that Mr. *Rodwell*, the solicitor of *Walter Woodman*, agreed with him that he should only pay costs out of pocket.

The Plaintiff eventually took a decree in *Watson* v. *Wilson* as a short cause, notwithstanding Mr. *Rodwell's* resistance, and no decree was ever taken in the second suit.

Negotiations for a compromise between the Plaintiff and the *Woodman* family were set on foot, in which Mr. *Rodwell* acted for the *Woodmans*, but in the month of July, 1873, the Plaintiff went to Mr. *Rodwell's* office, apparently at the suggestion of Mr. *Rodwell*, and became his client. The negotiations proceeded, and resulted in the arranging of a compromise between the Plaintiff, her sister, and the nephews, by which the Plaintiff was to forgive the latter certain debts, to allow her sister a certain annuity, and to take the residue for herself. All the parties were *sui juris*, except that two of Mrs. *Woodman's* children were bankrupt, and a deed of arrangement was prepared embodying the following terms: 1. The Plaintiff released her nephews, Mrs. *Woodman's* sons, from certain debts. 2. Mrs. *Woodman* and her sons assigned to the Plaintiff their contingent interests in the leaseholds. 3. *J. Wilson* (the co-executor) was indemnified from all liability under the will. 4. The Plaintiff allowed Mrs. *Woodman* a present annuity of £100 in place of the deferred annuity of £500. 5. The Plaintiff undertook to pay all costs of *Watson* v. *Wilson* and *Woodman* v. *Watson* and of the first compromise. Two of the sons of Mrs. *Woodman* being bankrupt the deed was expressed to be provisional only as regarded them.

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A petition was prepared by the Defendant Mr. *Rodwell*, acting as solicitor for all parties (to which, however, the assignee of the bankrupts' estates were not made parties), to obtain the consent of the Court to this release, and to wind up the administration suits. An order was made in accordance with the prayer of the petition, and the deed of compromise was executed, together with other deeds, including a deed of indemnity, to Mr. *Wilson*, the Plaintiff's co-executor.

It was proved to the satisfaction of the Vice-Chancellor that the costs of the deeds of compromise and the petition, which in his opinion was unnecessary, amounted to nearly £1000.

The Defendant produced evidence that the deed and the petition were explained to the Plaintiff, and that at the hearing of the petition the Vice-Chancellor asked the Plaintiff if she understood that she was to pay the costs of the suits, and that she said she did.

At the hearing of the petition it was ordered that £1000 should be deposited to answer the costs of Messrs. *Kimber & Ellis*, and certain of the bank shares were converted for this purpose.

On the 25th of March, 1874, the Defendant delivered to the Plaintiff his bill of costs and cash account, which, after providing for his own and Messrs. *Kimber & Ellis*' bill of costs, shewed a balance due to the Defendant of nearly £350.

On the 22nd of May, 1874, the balance due to the Defendant was agreed at £230, and a memorandum to that effect was placed at the foot of the cash account, and signed by the Plaintiff and Defendant. The Defendant relied on this as a settled account, and declined to reopen it or to have any bills prior to that date taxed.

The Defendant was in the habit of making advances to the Plaintiff, who was now in great poverty, and held securities upon her interest in the leasehold houses to secure the amount owing from her to him, which included further costs.

This action was instituted on the 21st of March, 1876, and is reported on an application with reference to the pleadings (1).

Certain correspondence took place after the institution of the action between the Plaintiff and Defendant personally, in which

(1) 3 Ch. D. 380.

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the Defendant found fault with the Plaintiff's present solicitors, and tried to persuade her to leave them, and on being ordered to pay certain costs of an application made in the action, he paid them to the Plaintiff personally and not to her solicitors.

Argument.

Higgins, Q.C., and *Fooks*, for the Plaintiff:—

The Plaintiff has acted under pressure and undue influence, and was never made to understand what costs she was paying: *Smith* v. *Kay* (1); *Rhodes* v. *Bate* (2); *Barrett* v. *Hartley* (3); *Talbot* v. *Marshfield* (4); *Langstaffe* v. *Fenwick* (5). The amount of costs has been altogether excessive, and the circumstances are sufficient to induce the Court to open the account, and order the bills to be taxed.

Excessive overcharges are "special circumstances" within the 41st section of the *Solicitors Act*: *Morgan* v. *Higgins* (6); *Gardener* v. *Ennor* (7); *In re Robinson* (8); *Coleman* v. *Mellersh* (9); *Tomson* v. *Judge* (10); *Cooke* v. *Setree* (11).

Glasse, Q.C., and *Renshaw*, for the Defendant:—

Twelve months, in the absence of fraud, is an absolute bar to the taxation of a bill which has been paid twelve months: *Blagrave* v. *Routh* (12); *Waters* v. *Taylor* (13); *Horlock* v. *Smith* (14); *Davis* v. *Parry* (15).

Mere overcharge is not a special circumstance within the Act. *Re Barnard* (16); *Re Harle* (17). *In re Robinson* (18) is contrary to all the cases in Chancery.

Judgment.

MALINS, V.C., after stating the institution of the administration suits of *Watson* v. *Wilson* and *Woodman* v. *Watson*, continued:—

It is said by the Defendants that counsel advised the institution

(1) 7 H. L. C. 750.
(2) Law Rep. 1 Ch. 252.
(3) Ibid. 2 Eq. 789.
(4) Law Rep. 4 Eq. 661; Ibid. 3 Ch. 622.
(5) 10 Ves. 405.
(6) 1 Giff. 270.
(7) 35 Beav. 549.
(8) Law Rep. 3 Ex. 4.
(9) 2 Mac. & G. 309.
(10) 3 Drew. 306.
(11) 1 V. & B. 126.
(12) 2 K. & J. 509; 8 D. M. & G. 620.
(13) 2 My. & Cr. 526.
(14) Ibid. 495.
(15) 1 Giff. 174.
(16) 2 D. M. & G. 359.
(17) 17 W. R. 21.
(18) Law Rep. 3 Ex. 4.

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of the second suit, but there was, in my opinion, no justification for the institution of it, for there was one already in existence for the administration of the same estate, and the *Woodman* family might have attended the proceedings in that suit. The suit of *Watson* v. *Wilson* was heard as a short cause, notwithstanding Mr. *Rodwell's* opposition, and no decree was ever taken in the second suit, and its institution has been a mere waste of expenditure. Then a most material circumstance for the decree which I am about to make is that the Defendant Mr. *Rodwell* agreed with *Walter Woodmam*, the Plaintiff in that second suit, that *Walter Woodman* should only pay Mr. *Rodwell* costs out of pocket, so that it was his interest to get his remaining costs out of Mrs. *Watson*, when she afterwards became his client. She became his client, according to the evidence, on his invitation or suggestion, in the month of July, 1873, when he was already acting for her nephews, who took an opposite view from her of the construction of the will, and when it was his interest, as mentioned above, to get all the costs of the second suit, instituted by him, out of her estate. Then in the eight succeeding months a more extraordinary amount of costs than I could have conceived possible was made up against the Plaintiff, amounting to sixteen bills of costs, more than 472 folio pages in the whole, and these costs were merely for managing a few leasehold houses producing £300 a year, and some shares in the *London Joint Stock Bank*; and the only business done was the carrying out of the compromise. All parties to that compromise were *sui juris*, and a short deed, which an experienced conveyancer could have settled in a few hours, would have concluded the matter. But I find in the Defendant's bills continual charges for attendances, consultations, and other business in reference to this matter, multiplying the costs to hundreds of pounds in a manner almost incredible. £1100 was charged by Mr. *Rodwell* alone in eight months for doing that which ought to have been done for £50 or £100 at the utmost. Not only this, but a petition for confirmation of the compromise was advised and presented, all parties, as I said before, being *sui juris*, except that two of the nephews were bankrupts, and actually their assignees were not brought before the Court; so it was a purely mistaken proceeding; but this also led to costs

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amounting to over £400. It appears from the evidence that I put some questions to the Plaintiff on the hearing of the petition, but I had not the information I now have, especially as to the agreement between the Defendant and Mr. *Woodman* as to the costs of the second suit, or my questions would have been very different. It now turns out that Mr. *Rodwell*, as part of the arrangement, made the Plaintiff pay the costs of an adverse litigation, amounting to £291, without telling her of that agreement that the Plaintiff in that second suit should only pay costs out of pocket. On the 27th of March, 1874, Mr. *Rodwell* sent accounts to the Plaintiff, who must be taken upon the evidence to have been acting without proper independent advice, and a deed of release, which cost over £100, for her to sign. There was no occasion for a release. Mr. *Wilson*, the co-executor of the Plaintiff, had done nothing but prove the will, and had incurred no responsibility, there having been an administration decree made in the first suit. By those accounts Mr. *Rodwell* and other solicitors who had been employed in these transactions were allowed to take more than £1000 in costs. It is said that this deed was fully explained to the Plaintiff, but she could not have been made fully to understand the position in which she was placed. The deed was executed. After this, on the 22nd of May, 1874, a complicated account was settled between the Plaintiff and Mr. *Rodwell* which, under the above circumstances, the Plaintiff, being aged and inexperienced, could not have understood; he there charged her with the costs of the adverse suit against her, which was an improper charge, especially after the agreement with the nephew to take from him only costs out of pocket. Now, then, I have to decide first whether these accounts and bills of costs are liable to be opened and taxed, notwithstanding the settlement of account. It is shewn that the Plaintiff was not in a position to resist the demands made by the Defendant, for she was always under pressure for money, which he sent her from time to time, and she is proved to have asked him on that very day for an advance of £50, and he only allowed her £20. Therefore, as there has been an excessive amount of charges coupled with pressure on the client, I shall allow the accounts to be opened unless the law prevents me from doing so.

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As regards the cases, I concur in the decision in *In re Robinson* (1), and hold that exorbitance of charge has always been held a special circumstance, inducing the Courts to open bills of costs after a year, and here I find the bills of such an inordinate amount that I consider them within the principle. The Court will also look to the position of the parties and the relation of solicitor and client. No doubt, where the client is a business man able to defend himself, the Court is slow to undo such a transaction; but in the case of an aged woman, ignorant and uninformed, it cannot hesitate to do so. In the case of *Morgan* v. *Higgins* (2), the client being in ill-health and unable to manage his own affairs, a settled account between him and his solicitor was set aside, the Court being of opinion, as I am in this case, that the client was not of sufficient capacity and knowledge to defend his own interests properly; certainly no one can say that in this case the Plaintiff could estimate the propriety of the bills. The case of *Gardener* v. *Ennor* (3) shews how jealously the Court regards the position of solicitor and client in transactions like the present. *Davies* v. *Parry* (4) was also decided by Sir *J. Stuart*, and illustrates the same principle. The rule laid down in *Lawless* v. *Mansfield* (5) by Lord *St. Leonards* has, no doubt, been questioned in *Blagrave* v. *Routh* (6), but not so as to throw any doubt on the principle that the Court will open such an account under special circumstances. The cases of *Waters* v. *Taylor* (7), *Blagrave* v. *Routh*, and *Horlock* v. *Smith* (8), have been principally relied upon by Mr. *Glasse*. But in *Waters* v. *Taylor* an account was attempted to be opened which had been acquiesced in for eighteen years, and Lord *Cottenham* declined to do so. In *Horlock* v. *Smith* the Lord Chancellor gives the reasons for not opening the account; he says (9): "The relation of solicitor and client has ceased; another solicitor has been employed by the client, and there is no evidence of pressure." So again, *Blagrave* v. *Routh*, where no relief was given, was a case where long litigation had been carried on, and five years and a half before the

(1) Law Rep. 3 Ex. 4.
(2) 1 Giff. 270.
(3) 35 Beav. 549.
(4) 1 Giff. 174.
(5) 1 D. & War. 557.
(6) 8 D. M. & G. 620.
(7) 2 My. & Cr. 526.
(8) Ibid. 495.
(9) 2 My. & Cr. 520.

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bill was filed the relation of solicitor and client had been determined, and the Court, not being satisfied that there was anything unfair or unreasonable in the account, declined to interfere. In these cases then the clients had had other advice.

But here the relation of solicitor and client continued, and there was evidently very great astuteness, energy, and pressure on the one side, and ignorance, incapacity, and want of business habits on the other. I consider that it is a case where relief ought to be given. The case of *Coleman* v. *Mellersh* (1) is very applicable, and I decide that, as in that case, the account must be dealt with as an open account. No doubt if this Plaintiff had gone on for an unreasonable time without making any claim against the Defendant, the Court must have refused to interfere, for it would be impossible to say that after any lapse of time a settled account must be opened. But a year's delay is not necessarily fatal to the claim, for the Court is left by the Act of Parliament to decide what "special circumstances" are sufficient to enable it to refer a bill of costs for taxation after payment. Indeed, I can see no honest reason why these complicated accounts should have been settled when they were, why these exorbitant bills of costs should have been sanctioned while the relation of solicitor and client still went on. The Defendant must have considered that he would thus be able to defy all attempts at taxation. The result is that between the year 1872, when the Plaintiff's husband died, leaving her in comfortable circumstances, and 1874 she has been brought into a state of abject poverty, having had to pay or become liable for, so far as I can calculate, between £2000 and £2500 in costs.

The Defendant has since the institution of this suit written to the Plaintiff herself, telling her that her present solicitors are not conducting her business and defending her interests properly, and seeking to get her as a client of his own again. He has also paid certain costs, which I ordered him to pay, of an application in the suit, to the Plaintiff personally instead of to her solicitors, adopting, as he said, under irritation, a course for which he could give no justification.

The accounts alleged to be settled must be opened, and all costs of *Woodman* v. *Watson* and of the petition must be disallowed.

(1) 2 Mac. & G. 309.

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There must be a general account of all dealings between the Plaintiff and Defendant, and the usual accounts of what is due on the securities, and the Defendant must pay the costs of the action.

V.-C. M. 1878 WATSON v. RODWELL.

Solicitors: *Stevens & Co.; Joseph Mote.*

TWEEDALE *v.* TWEEDALE.

V.-C. M. 1878 Feb.

Power of Appointment—Power coupled with a Trust—Condition Precedent—Impossibility of Condition—Marriage with Consent.

A testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune on her death to her husband. She married in the testator's lifetime with his consent:—

Held, that the provision was equivalent to a gift to the husband of the life interest.

PETITION.

Statement.

James Tweedale, by his will, dated the 16th of November, 1820, declared that in case any of his daughters should marry with the approbation of the trustees under his will, he gave his trustees power to grant to the husband of any daughter so marrying, for the term of his natural life, the interest, dividends, and annual produce of the fortune of such daughter, or such part thereof as the trustees in their discretion should think proper in the event of his surviving his said wife.

The testator died on the 16th of July, 1839, leaving three sons and three daughters surviving, one being *Susan Rose Lushington*, who was married, with the testator's consent, to *Charles Lushington* in 1835.

The above suit was instituted for the administration of the trusts of the will, and in such suit a sum of Bank Annuities was carried over to "the account of the £4000 bequeathed to *Susan Rose Lushington* for life."

Two of the daughters became lunatic, and *Susan Rose Lushington* died on the 5th of September, 1877.

The question was, whether the capital standing to *S. R. Lushington's* account should go to the estate of the lunatic sisters at

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V.-C. M. 1878 TWEEDALE v. TWEEDALE.

once, or whether *Charles Lushington* was entitled to the income thereof under the above-stated provision in *James Tweedale's* will. The trustees of the will had made no appointment.

Argument.

Prior, for the Petitioner:—

Is it not a condition precedent to the husband's taking an interest, that the trustees should approve the marriage?

Norton, for the Respondents:—

Though the trustees never approved the marriage of Mrs. *Lushington*, because it took place before the testator's death, yet as the testator did, it comes to the same thing; and the Court can do that which the trustees were empowered to do: *Lewin* on Trusts (1); *Gower* v. *Mainwaring* (2).

[MALINS, V.C.:—My difficulty is, that it is a power given to the trustees which they did not exercise.]

In *Wheeler* v. *Warner* (3) the consent to a marriage similarly given by a father in his lifetime was held equivalent to a consent by the trustees.

Cecil Russell, for the Plaintiff in the cause, offered no opposition.

Pryor, in reply:—

The marginal note of *Wheeler* v. *Warner* is not quite correct. The testator did not "authorize," but "directed" his trustees to appoint, and the discretion was as to the amount only.

Judgment.

MALINS, V.C.:—

I am clearly of opinion that whatever the rights of the trustees to exercise a discretion in this case originally were, in the events which happened that discretion was done away with. As the testator's daughter married in the lifetime of her father, it was just the same as regards the fulfilment of the condition as if she had married after his death with the consent of the trustees. But there is a power which has not been exercised. It does not appear that they refused, but they omitted, to exercise the power; and the question now before me is whether the Court can say that

(1) 6th Ed. p. 681. (2) 2 Ves. Sen. 87. (3) 1 S. & S. 304.

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V.-C. M. 1878 TWEEDALE v. TWEEDALE. Judgment.

the husband can take a life estate notwithstanding that it has not been duly given to him by appointment under the will. I am relieved from difficulty, I think, by the case of *Wheeler* v. *Warner* (1), which has been cited; for there a daughter, to whose husband the testator directed his trustees to advance part of her fortune (they having a discretion as to the amount) if she married with their consent, married, as here, in the testator's lifetime, and Sir *John Leach* decided, first, that the father's consent was equivalent to that of the trustees; and, secondly, that the direction was, under the circumstances, equivalent to a gift to the husband of all that the trustees had power to appoint. I shall adopt the principle of that judgment, and hold that the husband is entitled to a life interest in the fund.

Solicitors: *Norton, Rose, Norton, & Brewer.*

In re ANDREWS' TRUSTS.

V.-C. M. 1878 *Feb.* 8.

Bankruptcy Act, 1869, *s.* 91—*Trader's Settlement—Covenant to settle—Interest in Property.*

A trader, who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself and the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him and the remainder to other children, and subsequently he became bankrupt:—

Held, that the covenant was not void under sect. 91 of the *Bankruptcy Act*, 1869.

Statement.

ROBERT ANDREWS, by will dated the 12th of November, 1839, gave his real and personal estate in trust for his widow for life, and after her death for his children, as his said widow should by deed or will appoint, and in default equally among them.

The testator died in 1848, and *Frederick Andrews*, one of his children, was a trader, trading as *Andrews & Co.*

The widow, by a deed poll dated the 23rd of April, 1867, appointed one-third of the property to a sister of *Frederick Andrews.*

(1) 1 S. & S. 304.

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V.-C. M. 1878 — *In re* ANDREWS' TRUSTS.

Statement.

By an antenuptial settlement dated the 15th of April, 1868, *Frederick Andrews* covenanted that if he should, under the will of his father, under or by virtue of any power of appointment, or in default of appointment become entitled to any property of the value of £100 or upwards, he would settle the same, or the proceeds thereof, on the trusts of the settlement.

By a deed poll dated the 8th of October, 1872, the widow appointed one-third of the property to *Frederick Andrews* absolutely, if he should be living at her death, with power for her to revoke the appointment, and the other one-third to the only other child of the testator.

On the 21st of January, 1876, Mr. *Andrews* filed a petition for liquidation, and obtained his discharge on the 20th of November, 1876.

His widow died in February, 1877, without revoking her appointment.

The question was whether the property so appointed to *Frederick Andrews* vested in the trustee appointed in his liquidation, for the 91st section of the *Bankruptcy Act*, 1869, provides that "any covenant made by a trader in consideration of marriage for the future settlement upon his wife or children of property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, shall, upon his becoming bankrupt before such property has been actually transferred pursuant to such covenant, be void against the trustee" in bankruptcy; and it was contended on behalf of the trustee in bankruptcy that Mr. *Frederick Andrews* had no interest in his appointed share until the death of his mother.

A petition was presented on behalf of the trustees of the settlement claiming the property, to which the trustee in the liquidation was made a Respondent.

Argument.

Glasse, Q.C., and *Popham*, for the Petitioners.

J. Pearson, Q.C., and *Oswald*, for the trustee in liquidation:—

The appointment created an entirely new estate, which was not to vest in Mr. *Frederick Andrews* until his mother's death:

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In re Vizard's Trusts (1). Therefore the covenant is void as against the trustee in the liquidation under the 91st section.

V.-C. M. 1878 *In re* ANDREWS' TRUSTS.

MALINS, V.C.:—

Judgment.

The Petitioners are entitled to this fund. If the widow had had a general power of appointment I might have held that at the date of the marriage Mr. *F. Andrews* had no interest under the will, but all that the widow could do was to make a selection between the children who were interested under the will, whether she appointed or not. Mr. *Frederick Andrews* had at least a vested interest in an equal share (one-third) of the property, subject to be divested by an appointment. He had, therefore, at the date of the settlement, an interest under the will, and his covenant is valid as against the trustee in liquidation.

Solicitors: *Tatham, Procter & Co.; Frederick Bradley.*

In re GENERAL SOUTH AMERICAN COMPANY.

V.-C. M. 1877 *Nov.* 17, 24.

Foreign Bill of Exchange—Re-exchange—Liability of Acceptor.

The drawer of a bill of exchange in a foreign country accepted in *England* is entitled, upon the bill being dishonoured and protested, to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange.

Statement.

THIS was an adjourned summons in the winding-up of the *General South American Company* on a claim made by the *Bank of Lima* to a sum of £2469 11*s.* 6*d.*, reduced from the original claim, which was £8119, for money paid by the bank in respect of re-exchange upon various bills of exchange which had been drawn by the bank upon the company, and were subsequently dishonoured by the company.

The *General South American Company* was established in the year 1868, to carry on the business of general merchants with

(1) Law Rep. 1 Ch. 588.

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V.-C. M. 1877 — *In re* GENERAL SOUTH AMERICAN COMPANY. — Statement.

America, and this business was pursued successfully for many years. The company had an agent at *Lima* named *Chavez*, who entered into an agreement with the *Bank of Lima* to grant it a continuing credit of £100,000, upon the terms of a letter of the 11th of April addressed to Mr. *Chavez* by the managers of the *Bank of Lima*, which was in the following words:—

"Dear Sir,—We have read the basis you have been pleased to fix in order to open a credit to the *Bank of Lima*, and we take the liberty to state in continuation a project of arrangement in this respect in order to know if we express them rightly, and if they meet with your approbation.

"1. The total amount of credit will be £100,000, to dispose of all or part as it may suit the bank, drawing bills on *London* at ninety days on the *General South American Company*.

"2. As soon as the bank may have drawn the first draft they will pay to the *General South American Company* ½ per cent. on full amount of credit, £100,000, as opening commission, that is to say, the sum of £500 sterling, which payment of commission will be for once only.

"3. They will also pay to said *South American Company* a commission of ¾ per cent. for acceptance and payments of bills on the amount of drafts the *Bank of Lima* may draw on them.

"4. The *Bank of Lima* will allow the *South American Company* interest at 5 per cent. per annum, or 1 per cent. above bank rate, when it exceeds 5 per cent. per annum.

"5. The *Bank of Lima* are under the obligation to cover their drafts within ninety days after the dates of their acceptance in *London* with other bills at ninety days' sight which may not be drawn on the same *General South American Company*.

"6. The credit of £100,000 will always be in force for the *Bank of Lima* according as they place the *General South American Company* in funds for the amounts as they may have drawn against them.

"7. The bills which the *Bank of Lima* may draw on the *General South American Company* must be signed by one of the two undersigned managers as follows:—For the *Bank of Lima*, the managing directory.

"We wish that the business may be the beginning of larger

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transactions that the *Bank of Lima* may be able to do with the *South American Company* for our benefit; and we beg to subscribe ourselves

"Your obedient servants,

"*Julian Laracondegm,* } Managing
"*T. F. Lembeke,* } Directors."

To this letter M. *Chavez* replied, on the 13th of April, to the managers of the bank in these terms:—

"Dear Sirs,—In answer to your favour of yesterday I have the pleasure to inform you that you have expressed rightly the basis of the credit I took the liberty to submit to you in favour of the *Bank of Lima,* and for my part the business remains accepted under the conditions contained in your letter; in virtue of this you can begin drawing when it may suit you, and to this effect I write by the steamer of to-morrow to the *General South American Company,* informing them of this arrangement, which I am sure will be received with satisfaction. Entertaining the same desire as yourselves, that this business will be the beginning of others which will be undertaken later on between both companies to their mutual benefit, I subscribe myself

"Your obedient servant,

"*Manuel C. Chavez.*"

These terms were confirmed by the *General South American Company;* and by a subsequent communication from the company it was stipulated that the *Bank of Lima* should cover their drafts upon the company seventy-five days after their respective dates, and this stipulation was acceded to by the bank. The arrangement was afterwards varied by reducing the amount of the credit from £100,000 to £50,000, but in all other respects it was carried out in the following manner:—The *Bank of Lima* used to draw upon the *General Company* at ninety days' sight and the *General Company* accepted these bills. The *Bank of Lima* used to remit cover fifteen days before the due date of the acceptances, and the business was carried on upon this footing until the stoppage of the *General Company* on the 18th of March, 1875. On the 5th of April, 1875, resolutions were passed by the company to wind up voluntarily, and on the 16th of April the voluntary winding-up

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Statement.

was continued under supervision by an order of the Court, and liquidators were appointed.

The position of matters between the *Bank of Lima* and the *General Company* at the date of its suspension on the 18th of March, 1875, was as follows: On the whole transaction the bank were creditors of the company, without any allowance for re-exchange, for about £27,905, and they had been admitted as creditors for that sum, and had received their dividends upon it.

In addition to the above sum the *Bank of Lima* sought to be admitted to prove for a sum of £10 per cent. for re-exchange on the amount of bills sent back to *Peru*, which they had had to pay, and which was alleged to be a fair and proper charge in a case like the present, and the amount which the holder of a bill was entitled to charge according to the laws of *Peru* upon a bill being dishonoured and protested. On the other hand, the liquidators submitted that the bank could only prove for such charges as were properly incurred in respect of protests, notarial charges, and consular fees, or otherwise for the purpose of obtaining substituted credit in respect of acceptances for which cover was held by the company at the date of the stoppage, and these sums had already been offered to the bank, but were refused.

Argument.

J. Pearson, Q.C., and *Kekewich*, Q.C., for the *Bank of Lima*:—

The contract in this case, which was entered into by the *Bank of Lima* and the *South American Company*, upon the terms of the two letters of the 11th and 13th of April, 1875, was an English contract, and was to be performed entirely in *England*. There was to be a credit of £100,000, subsequently reduced to £50,000. The drawing by the bank was to commence at once, and the moment the bills were drawn the company was bound under the contract to accept those bills. It was an unqualified agreement to accept the bills. We say we have a right to recover £10 per cent. upon the dishonoured bills, in consequence of the loss and damage caused to us by such dishonour. There is no evidence to shew that we did not perform our part of the contract, and there were sufficient funds in the hands of the company at the time of the stoppage to answer all the bills drawn by us. We have it in evidence that we have been obliged to pay 10 per cent., and that

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that is a reasonable amount, and that amount of damage we call re-exchange. Whether we rely on express contract, or on the ordinary contract between drawer and acceptor, we are entitled to these charges.

In *Walker* v. *Hamilton* (1) it was held that the acceptor in *London* of a bill of exchange drawn in *Louisiana* was entitled to prove not only for the amount of the bill, but also for 10 per cent. upon the amount in lieu of re-exchange, which by the law of *Louisiana* he had been obliged to pay on the bills being dishonoured and protested. The same principle was acted upon in *Francis* v. *Rucker* (2), but the amount in that case was £20 per cent., which the acceptor was liable to under the law in force in *Pennsylvania*. *Rolin* v. *Steward* (3) and *Prehn* v. *Royal Bank of Liverpool* (4) are authorities to the same effect.

[They also cited *Mellish* v. *Simeon* (5) and *Storey* on Bills of Exchange (6).

Glasse, Q.C., *Higgins*, Q.C., and *Woolf*, for the official liquidator :—

Re-exchange is defined in *Byles* on Bills (7) to be the difference in the value of a bill occasioned by its being dishonoured in a foreign country in which it was payable. The theory of the transaction is, that the holder of a foreign dishonoured bill is entitled to immediate repayment by drawing and negotiating a cross bill, payable at sight on the indorser in *London*, for as much English money as will purchase in the foreign country the amount of foreign currency at the rate of exchange on the day of dishonour. No cross bills were drawn in this case, and therefore there is no liability for re-exchange, but it is laid down by the same author that the drawer of a bill is liable to re-exchange, though the acceptor is not so liable. In support of this two cases are cited: *Napier* v. *Schneider* (8) and *Woolsey* v. *Crawford* (9), where it was held that the holder of a dishonoured bill has no right to re-exchange from the acceptor. There is evidence here that there has

(1) 1 D. F. & J. 602.
(2) 1 Amb. 671.
(3) 14 C. B. 595.
(4) Law Rep. 5 Ex. 92.
(5) 2 H. Bl. 378.
(6) 4th Ed. p. 489, sec. 398.
(7) 10th Ed. p. 412.
(8) 12 East, 420.
(9) 2 Camp. 445.

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not been at any time a quotable exchange in respect of drafts drawn here on *Peru*; there cannot, therefore, be a claim for the re-exchange on drafts drawn on *Peru*, if no such thing as re-exchange exists in *Peru*. It is also laid down in *Chitty* on Bills (1), that though the drawer of a bill is liable for re-exchange, an acceptor is not liable, and his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest where interest is due.

Then, if the claim is not for re-exchange but for damages, the damages are not proved. It is not enough for the bank to say, We have paid to a third party £10 per cent. on our drafts. They might as well have fixed any other much larger amount. Even if, as against the drawer, the holder might be able to claim £10 per cent., it would not prove, that as between the drawer and acceptor, the claim is one that can be admitted according to English law.

We say, therefore, that the company, as acceptors of the drafts, are not liable, either by the law of *England* or *Peru*, to re-exchange; that there is no contract by the company to pay re-exchange, and if there is no contract there can be no damages for its breach; that the claim fails, according to Peruvian law, because there was no cross bill drawn by the bank; that in any case the company can only be liable for the actual protest and notarial charges and consular fees paid upon those acceptances of the company which were dishonoured and for which the company held cover at the date of the suspension; and that the £10 per cent. is an arbitrary sum and does not represent the amount of damages actually sustained by the claimants.

[They also cited *Chitty* on Bills.]

J. Pearson, in reply.

Judgment.

MALINS, V.C.:—

This is a case raising a question which very seldom occurs in a Court of Equity. If I thought any advantage would arise from deferring my judgment I would certainly do so, but having well considered the authorities which have been cited, I feel that I shall not derive any benefit from further considering the matter.

(1) 10th Ed. p. 442.

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The question arises out of certain mercantile transactions which took place between the *Bank of Lima* and the *General South American Company*, which is now going through the process of being wound up. This company has been represented to me as one which was formerly of high repute, but troubles having come upon them they were obliged to stop payment. The transactions which now give rise to this question were commenced in 1871, when a contract was entered into between the company and the *Bank of Lima*, which was founded upon two letters dated the 11th and 13th of April, 1871, and without reading them I may state that they were to this effect—that the company was to give the bank credit to the total amount of £100,000, to dispose of all or any part as it might suit the bank, drawing bills in *London* at ninety days on the *General South American Company*, and as soon as the bank should have drawn the first draft they were to pay to the company ½ per cent. on the full amount of credit as opening commission, that is, the sum of £500, which payment of commission would be for once only. The bank was also to pay to the company a commission of ¾ per cent. for acceptance and payment of bills on the amount of drafts the bank might draw on them, and the bank were to allow the company interest at 5 per cent. per annum, or 1 per cent. above bank rate when it exceeded 5 per cent. Then the *Bank of Lima* were to be under obligation to cover their drafts within ninety days after the dates of their acceptances in *London*, with other bills at ninety days' sight which might not be drawn on the company. The credit of £100,000 to be always in force for the bank, according as they placed the company in funds for the amounts they might have drawn against them. The only doubt which seems to arise upon the letters forming this contract, is whether the ninety days were to run from the acceptance of the bills or the time when they arrived at maturity. These transactions went on from April, 1871, till March, 1875, when the company suddenly stopped payment, and there was no delay in the appointment of a liquidator. It appears on the evidence and the correspondence between the company and the bank, that though there might have been some kind of complaint occasionally on the part of the company as to the quality of the bills sent over by the bank, those complaints were rectified,

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and no serious difficulty arose, so that it may be fairly said that the business was conducted upon the basis of the original contract, with satisfaction to both parties, and there was no substantial failure on the part of either to fulfil their engagements.

It appears that at the time of the failure of the company in March, 1875, the company held as cover to its acceptances £37,000 in bills and cash, which were afterwards returned by the liquidators to the agents of the bank with the sanction of the Chief Clerk, and at that time the bank were creditors of the company for about £27,905, and they have been admitted as creditors for that sum, and have received their dividend upon it. As a consequence of the stoppage of the bank, the acceptances were thrown back dishonoured upon the *Lima Bank*, and what I have now to consider is the effect of that dishonour.

It is admitted that the company are liable for all the bank claims, except those charges which are called re-exchange. That is, the liability is admitted as to all the claims except for the £10 per cent. Now it has been argued that although a drawer is liable for the re-exchange, or what is substituted for re-exchange, an acceptor is not so liable, and this is supported by the authority of the case of *Woolsey* v. *Crawford* (1) and *Napier* v. *Schneider* (2); but it is said that those two cases are overruled by the authority of *Walker* v. *Hamilton* (3). In that case the Lord Chancellor, in referring to *Napier* v. *Schneider*, said he thought if a fixed sum of £10 per cent. had been asked for, that would have been granted; but instead of that an uncertain sum, to be fixed by the master, was asked for, and on that account the application was refused. Then his Lordship said, in speaking of the case of *Woolsey* v. *Crawford*, that it was at most a *nisi prius* decision, and the point there decided only applied to the re-exchange, not to a sum which was liquidated and which could have been easily ascertained. But as to that *nisi prius* case, if it had been expressly in point, he should have said it could not outweigh the solemn decision of *Francis* v. *Rucker* (4).

Now I cannot accede to the argument that a drawer is under greater liability than an acceptor. I am of opinion that the

(1) 2 Camp. 445.
(2) 12 East, 420.
(3) 1 D. F. & J. 602.
(4) Amb. 671.

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primary liability is in the acceptor. The liability of the drawer is secondary, and if the drawer is liable so must the acceptor be.

The first case in which the acceptor was made liable is that of *Francis* v. *Rucker* (1). There it was shewn that by the law of *Pennsylvania* a bill drawn or indorsed there on persons in *England* and protested was to be paid to the holder with 20 per cent. for damages. Bills on a merchant in *England* were accepted by him. He then became bankrupt before the bills were due. They were protested for non-payment, and the drawer having paid the money due on the bills, and the 20 per cent. to the holder, was permitted to prove both under the commission. Then the case of *Walker* v. *Hamilton* (2) shews the liability of an acceptor. A drawer of bills of exchange in *Louisiana* upon acceptors in *London* was held to be entitled to prove under a deed of arrangement executed by the acceptors upon their becoming insolvent not only for the amount of the bills, but also for £10 per cent. upon the amount in lieu of re-exchange, which by the law of *Louisiana* he had been obliged to pay to the holder of the bills on their return, dishonoured and protested for non-payment in *Louisiana*. But I think the case which governs this in all respects is *Prehn* v. *Royal Bank of Liverpool* (3). There the Defendants, who were bankers at *Liverpool*, undertook to accept the drafts of the Plaintiffs, who were merchants at *Alexandria* and *Liverpool*, the Plaintiffs undertaking to put the Defendants in funds to meet the bills at maturity, and the Defendants receiving ½ per cent. for the accommodation. Bills were accordingly accepted by the Defendants, and the Plaintiffs duly provided the Defendants with funds exceeding the amount of the acceptances. Before the bills became due the Defendants' bank stopped, and they gave notice to the Plaintiffs that they would be unable to meet the bills. The Plaintiffs arranged with another house in *Liverpool* to take up the bills, paying 2½ per cent. commission, and they were also obliged to pay to the bankers the expenses of protesting the bills at *Liverpool* and *Alexandria;* and had also to incur expenses in telegraphic communications between *Liverpool* and *Alexandria*. The decision was that the acceptors of the bills were liable for the

(1) Amb. 671. (2) 1 D. F. & J. 602.
(3) Law Rep. 5 Ex. 92.

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V.-C. M. 1877 — *In re* GENERAL SOUTH AMERICAN COMPANY. — Judgment.

commission and the notarial and telegraphic expenses which the drawers had incurred. Lord Chief Baron *Kelly* said, in giving judgment, that, according to general principles, where parties entered into a special contract they were entitled in case of breach to recover in respect of any damage reasonably flowing from the breach; he was of opinion that the expenses incurred were reasonable, and the Plaintiffs were entitled to recover the money as general damage. Baron *Pigott* in his observations said he regarded the amount claimed as special damages, which were to be measured by the 2½ per cent. which the Plaintiffs paid, and the other actual expenses they incurred.

The principle there decided is that those necessary expenses incurred by the drawer of a bill in consequence of its having been dishonoured and protested by the acceptor, the drawer is entitled to recover from the acceptor. Therefore I think, on the authority of that case and the other cases I have referred to, the principle is established, that where a bill is dishonoured the drawer is entitled to recover from the acceptor, not only the amount of the bill and interest, but also all such reasonable amount of expenses as may have been caused by the dishonour, including the expenses of re-exchange, and that in this case the *South American Company* is liable for what has been reasonably expended by the *Bank of Lima*.

The only remaining question therefore is, what is a reasonable amount. If this were an action tried at law, the question of amount would necessarily be submitted to a jury, but it appears that the *Bank of Lima* has paid £10 per cent. for the re-exchange, and there is no evidence to shew that that sum is in any manner unreasonable; therefore, in my opinion, the bank is entitled to have the amount of their claim admitted against the company.

Solicitors: *Freshfields & Williams; Michael Abrahams & Roffey.*

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In re PUTTRELL'S TRUSTS.

V.-C. H.
1877
Nov. 14.

Practice—Trustee Relief Act, 1847 (10 & 11 *Vict.* c. 96)—*Payment out—Petition—Person not named in Trustee's Affidavit.*

A person not mentioned in the trustee's affidavit may apply by petition for the payment out of Court of moneys paid in under the *Trustee Relief Act*.

Re Jephson (1) not followed.

Statement.

PHILIP PUTTRELL, who died in 1816, by will bequeathed a sum of stock upon trust, after the determination of certain prior interests, for the benefit of the children of his brothers and sister. The trustee of the will transferred the fund into Court, and in his affidavit set out the names of the children of the sister of the testator, but by mistake stated that his brothers left no children. One of his brothers, *Edward Puttrell*, however, did leave one child, who had since died.

Argument.

Boome, for the representative of this child, now applied for the direction of the Court as to the proper mode of procedure. He was desirous of obtaining a transfer of the share of the child in question; but it appeared upon the authorities that the representative of this deceased child, not having been mentioned in the affidavit made by the trustees when they paid the money into Court, could not apply by petition, but must bring an action: *Morg.* Ch. (2); *Re Jephson* (1); *Crause* v. *Cooper* (3).

Judgment.

HALL, V.C.:—

That does not appear to me to be a correct statement of the practice. The 2nd section of the *Trustee Relief Act*, 1847, which regulates applications of this character, does not require an action to be brought; and as to the authorities cited, the case of *Re Jephson* has not been followed in the later practice of the Court, while in the case of *Crause* v. *Cooper* the fund which the Plaintiff

(1) 1 L. T. (N.S.) 5. (2) 5th Ed. p. 72.
(3) 1 J. & H. 207.

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claimed had been actually paid out to persons who, according to his contention, were not entitled to it.

Considering, therefore, that this application is unnecessary, I shall decline to make any order upon it.

Solicitors: *J. Attenborough*, agent for *Hunnybun & Son, Huntingdon.*

V.-C. H. 1877 Nov. 28.

PEACOCK *v.* HARPER.

[1876 P. 241.]

Practice—Affidavits in reply—Rules of Court, 1875, *Order* XXXVIII., *r.* 3.

Where evidence is taken by affidavit under Rules of Court, 1875, Order XXXVIII., r. 1, the Plaintiff's affidavits in reply need not be restricted to cutting down the Defendant's evidence, but may be confirmatory of the Plaintiff's evidence in chief, and the practice to this effect in the Chancery Division has not been altered by rule 3 of the same Order.

Statement.

THIS was a light and air action in which the Plaintiff, who was the lessee of No. 9, *Brunswick Terrace, Brighton*, claimed a mandatory injunction against the Defendant, who was the freeholder and occupier of No. 8, to compel him to take down certain buildings erected in the rear of No. 8, which, he alleged, diminished his light and air, or in the alternative for an inquiry as to damages.

During the hearing of the action, which does not call for any report upon the merits, and which came on upon issue joined and a consent to take evidence by affidavit under the Rules of Court, 1875, Order XXXVIII., rule 1, *Hastings*, Q.C., and *Methold*, for the Plaintiff, proposed to read the affidavits filed on behalf of the Plaintiff in reply to the Defendant's evidence, which were four in number; two of them being affidavits by additional witnesses who were tradesmen in the habit of coming to the Plaintiff's house, and who deposed to the diminution of light caused by the Defendant's buildings; and the other two being affidavits by the Plaintiff and one of his servants (who had already given evidence in chief) principally confirmatory of the Plaintiff's evidence in chief.

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W. Pearson, Q.C., and *Renshaw*, for the Defendant:—

These affidavits cannot be read. They are simply affidavits in support of the Plaintiff's original case, directed entirely to the strengthening and confirmation of the Plaintiff's evidence in chief, and they are not, as they ought to be, "strictly in reply," that is, directed to the cutting down of the Defendant's evidence. Before the *Judicature Act* such affidavits were not admitted in the Courts of Common Law, where it was always held that the Plaintiff was bound to go into his whole case in the first instance: *Rex* v. *Hilditch* (1); *Rowlandson* v. *Fenton* (2); *Jacobs* v. *Tarleton* (3); *Starkie* on Evidence (4); *Taylor* on Evidence (5). And although there was formerly much loose practice as to evidence in the Courts of Chancery, such practice has been put an end to, and the procedure in the Common Law and Chancery Divisions assimilated by the Judicature Acts; and now the practice as to evidence is the same in the Chancery as in the Common Law Division, and is governed by the Rules of Court, 1875, which provide in Order XXXVIII., rule 3, that the Plaintiff's affidavits in reply "shall be confined to matters strictly in reply."

Hastings, Q.C., and *Method*, for the Plaintiff:—

That rule is simply a copy of the old consolidated order as to affidavits in reply on motion for decree in Chancery, under which it was well settled that confirmatory affidavits were admissible: Cons. Order XXXIII., r. 7.

[They were stopped by the Court.]

Judgment.

HALL, V.C.:—

The practice which has always prevailed in the Court of Chancery of permitting a Plaintiff to file affidavits in reply, bringing forward additional witnesses, may possibly be considered open to observation, but it has some advantages. Where there are questions of fact in dispute, a Plaintiff cannot tell beforehand how many witnesses the Defendant may produce, and may consider it improper to overload his case at the outset with a number of

(1) 5 Car. & P. 299.
(2) 1 C. L. R. 344.
(3) 11 Q. B. 421.
(4) 4th Ed. p. 609.
(5) Vol. i. sect. 358, p. 392.

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witnesses, but I cannot hold that rule 3 of Order XXXVIII. has had the effect of altering the practice which always prevailed in the Court of Chancery, or that the practice under the Judicature Acts in the Chancery Division is to be regulated simply by the practice which prevailed before those Acts at common law. The affidavit must be admitted.

The hearing of the case was then continued.

Solicitors: *Evans, Foster, & Rutter; Clarke & Calkin.*

V.-C. H. 1877 Dec. 14.

In re LENZBERG'S POLICY.

Composition with Creditors—Single Creditor, Agreement for subsequent Payments to—Payments thereunder, Recovery back of—Fraud on Creditors.

Where a creditor at the time of signing a composition deed under the 192nd section of the *Bankruptcy Act*, 1861, took from the debtor a private agreement that the debtor should make future payments on his account:—

Held, that the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder.

Statement.

SOME time before September, 1869, *Louis Lenzberg*, being indebted to *William Mosson Kearns* (who had previously acted as his solicitor) in respect of various sums of money advanced from time to time by *Kearns*, deposited with *Kearns*, as a security for such advances, a policy of assurance upon the joint lives of himself and his wife for the sum of £1000. *Lenzberg* had also before this time been in the habit of making certain weekly and monthly payments to certain persons in respect of allowances made to them by *Kearns*.

In September, 1869, *Lenzberg* being in difficulties, obtained the assent of several of his creditors to a composition deed, and on the 4th of the same month he went down into *Wales*, where *Kearns* was on a visit, to procure the execution by *Kearns* of the deed. After some discussion *Kearns* executed the composition deed as a creditor for £373 18*s.* 7*d.* The evidence as to the circumstances under which the deed was executed by *Kearns* was conflicting, and is stated below.

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V.-C. H. 1877 In re LENZBERG'S POLICY. Statement.

After *Kearns*, had executed the composition deed, *Lenzberg*, at his request, signed the following memorandum:—

"4th Sept. 1869.

"To *William M. Kearns*,

"I acknowledge that the weekly advances to *Frederick Hart*, and the monthly advances to Mrs. *Emarton*, and the weekly advances to Mrs. *M. K.* were agreed to be credited against the debts generally due from me to you, and the first and third of such payments, &c., will continue to be made by me and credited by you on account of such debts of 1863, 1864, 1865, 1866, 1868, and 1869.

(Signed) "*Louis Lenzberg.*"

Lenzberg then returned to *London*, and the deed having been executed by the statutory majority of his creditors, was duly registered under the *Bankruptcy Act*, 1861. *Lenzberg* subsequently made numerous payments in respect of the allowances to the persons mentioned in the memorandum, and other pecuniary transactions took place between him and *Kearns*.

In 1875 *Lenzberg's* wife died, and conflicting claims were made by *Kearns* and *Lenzberg* to the moneys which then became payable under the policy of assurance, *Kearns* claiming to be a creditor of *Lenzberg* for an amount exceeding the sum assured in respect of debts incurred both before and after the composition deed, and *Lenzberg* maintaining that all debts prior to the composition deed had been released thereby; and that by means of the payments made by him in respect of the allowances he had paid the whole of the composition due to *Kearns* under the deed, and was only justly indebted to *Kearns* in a sum of £170 or thereabouts. Under these circumstances, the assurance company paid the policy moneys into Court, and upon a petition presented by *Lenzberg*, the Vice-Chancellor, on the 9th of February, 1877, directed an account to be taken of the moneys owing by *Lenzberg* to *Kearns* on the security of the policy, and adjourned the further hearing of the petition.

The Chief Clerk made his certificate on the 20th of November, 1877, and thereby, after disallowing all claims made by *Kearns* prior in date to the composition deed, he credited *Lenzberg* in the account with the payments made by him in respect of the allowances above mentioned, as being payments made for or on account of

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Kearns. *Kearns* then took out a summons to vary the certificate (*inter alia*) by disallowing this credit, and that summons now came for hearing with the adjourned petition. In support of his summons *Kearns* produced evidence to shew that on the 4th of September, 1869, the sum of £373 18*s.* 7*d.*, the debt in respect of which he executed the composition deed, was only fixed upon as a nominal amount, and to give *Lenzberg* the requisite statutory majority of creditors; that the real amount of the debt at the time due from *Lenzberg* to him was very much larger; that the understanding was that no more than £373 18*s.* 7*d.* was to be released; and that *Lenzberg* promised, as a condition of his executing the deed, that he would repay him the whole of his debt in full; and further, that the execution of the composition deed and the giving of the memorandum were two different transactions. In one of his affidavits, however, he referred to the payments for allowances as having been made on his behalf. *Lenzberg* gave a different account of the transaction, and the Vice-Chancellor considered that in the result of the evidence the execution of the composition deed and the signing of the memorandum formed part of the same transaction.

Statement.

Argument.

Robinson, Q.C., and *F. G. Bagshawe*, for *Kearns*:—

Kearns could not have compelled *Lenzberg* to make the payments in respect of the allowances which are now in question, and such payments were purely voluntary. Being therefore made without any legal obligation, and under the memorandum, they were not on account or on behalf of *Kearns* so as to entitle *Lenzberg* to recover them back from him. *Lenzberg* was never authorized by *Kearns* to make these payments for him except under the memorandum. *Lenzberg* accordingly has no right to be credited with these payments as constituting a debt due to him from *Kearns*: *Brisbane* v. *Dacres* (1); *Wilson* v. *Ray* (2).

Method (*Dickinson*, Q.C., with him), for *Lenzberg*:—

Kearns admits in one of his own affidavits the authority to make the payments, but the agreement which he sets up was bad both at law and in equity, and *Lenzberg* might have obtained an

(1) 5 Taunt. 143. (2) 10 A. & E. 82.

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order that it should be delivered up to be cancelled: *Jackman* v. *Mitchell* (1); *Mare* v. *Warner* (2). An agreement of this character is fraudulent and against public policy, and money paid under it can be recovered back: *Bize* v. *Dickason* (3); *Smith* v. *Bromley* (4).

Argument.

HALL, V.C.:—There is an observation in favour of your contention in *Clay* v. *Ray* (5), where *Willes*, J., says (6), in reference to *Smith* v. *Cuff* (7), "The cases have gone so far as to hold that where the money has been paid it may be recovered back."

Robinson, in reply:—

The execution of the composition deed, and the giving of the memorandum, were separate transactions, and these subsequent voluntary payments did not decrease the fund applicable to pay the composition, and therefore were not made in fraud of the general body of creditors. In *Atkinson* v. *Denby* (8) the payment recovered back was made by the debtor to the creditor before the execution of the composition deed, and in order to purchase the creditor's consent to it. But if the debtor voluntarily pays the money afterwards he cannot recover it back.

Judgment.

HALL, V.C.:—

The question in this case is whether the sums paid in these weekly and monthly payments should or should not be brought into account, in the account which has been taken between these two parties. The contention is that the payments in question were made under an arrangement carried into effect by the actual payments, and that these, therefore, are not to be treated as made on account, or to be brought into account. The facts are in dispute. On the one side it is alleged that *Kearns* agreed to come into the composition for a nominal amount only, and not for the whole of his debt; that there was an almost contemporaneous arrangement (and the agreement is dated the 4th of September), under which these further sums were to be paid; and that the

(1) 13 Ves. 581.
(2) 3 Giff. 100.
(3) 1 T. R. 285.
(4) Cited 2 Doug. 695.
(5) 17 C. B. (N.S.) 188.
(6) Ibid. 190.
(7) 6 M. & S. 160.
(8) 7 H. & N. 934.

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In re LENZBERG'S POLICY.

Judgment.

payments were made under that arrangement. In the course of the argument I have been referred to authorities on the point, whether money actually paid, as this was, can be recovered back. The last case referred to of *Atkinson* v. *Denby* (1) is an authority that it can. Then it is endeavoured to distinguish this case in its circumstances. It is said that the memorandum which *Lenzberg* signed was a memorandum providing for future payments, which *Kearns* was not bound to make, and that from the character of the payments there was nothing wrong in the stipulation taken from the debtor. I cannot agree to that. It seems to me that the taking of any such engagement, whether the debtor is bound to pay or not, is equally obnoxious to the rule which prohibits private or independent agreements with creditors at the time when a general arrangement is being made with them. Those agreements are called by law fraudulent, and are so far considered so that money paid thereunder has been recovered back. It is said that this was an independent transaction, distinct from the composition. But it is to be observed that it is part of the same case that this creditor signed the composition for a nominal amount. It is therefore not clear that the giving of the memorandum was a distinct transaction; but it would seem as if the true explanation of what took place is, that *Kearns* was not content with a verbal promise, but got the stipulation put into writing. It therefore seems to me that the payments so made to the creditor's nominees are to be treated as having been made to himself, as they were on his own account, and one within the rule. But independently of that rule, I think that the obtaining of this letter from the debtor by *Kearns*, under the circumstances in this case, was a transaction which the Court would not allow to stand; and, accordingly, on equitable grounds alone, I cannot allow *Kearns* the benefit of any contract contained in the document. The conclusion is that the moneys in question were moneys paid by the debtor for the use of the creditor, and ought to be brought into account; and Mr. *Robinson's* client must pay the costs of the summons.

Solicitors: *Miller, Smith, & Bell; Johnson & Master.*

(1) 7 H. & N. 934.

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TRESTRAIL *v.* MASON.

V.-C. H.
1878
Jan. 15.

[1876 T. 48.]

Locke King's Act (17 & 18 *Vict. c.* 113)—*Mortgage comprising Realty and Personalty—Devise of Realty—Residuary Legatee—Payment of Mortgage Debt.*

Where real and personal estate are comprised in the same mortgage, the mortgage debt must, as between the devisees of the realty and the legatees of the personalty, be borne rateably by the real and personal estate subject thereto, and the real estate is not, under *Locke King's Act*, primarily liable to the payment thereof.

ADMINISTRATION ACTION.

Statement.

The testatrix, whose will was dated and proved after the passing of *Locke King's Act*, devised her real estate upon trust for one set of beneficiaries, and bequeathed her residuary personal estate upon trust for another set of beneficiaries. Part of the real estate of the testatrix and a policy of assurance forming part of her residuary personal estate were together comprised in a mortgage security which had been effected by the testatrix; and the question was whether the whole of the mortgage debt ought, under *Locke King's Act*, to be borne by the real estate comprised in the mortgage, or whether it should be borne rateably by such real estate and the policy of assurance.

Argument.

Bunting, for the Plaintiffs, who were persons interested in the real estate:—

The mortgage debt must be borne rateably by the real and personal estate subject thereto, and the legatees of the personal estate have no right to require the devisees of the realty to discharge the whole debt: *Evans* v. *Wyatt* (1); *Lipscomb* v. *Lipscomb* (2).

B. B. Rogers, for the Defendants, who were persons interested in the personal estate:—

Evans v. *Wyatt* was decided before it was settled that leaseholds

(1) 31 Beav. 217. (2) Law Rep. 7 Eq. 501.

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V.-C. H. 1878 TRESTRAIL v. MASON. Argument.

were not within *Locke King's Act;* moreover, in that case the present point was not argued; neither was it argued in *Lipscomb* v. *Lipscomb* (1), and when the latter case was referred to with approval by Vice-Chancellor *Wickens* in *De Rochefort* v. *Dawes* (2) it was upon another point. There being, then, no decision to govern the question, the words of the Act are plain, that land charged with the payment of any sum of money shall, as between the different persons claiming under the deceased, be primarily liable to the payment of all mortgage debts with which the same shall be charged. Accordingly, when two properties, one real estate and the other personal estate, are comprised in the same mortgage, the real estate must, as between the devisees and legatees, bear the whole mortgage debt.

Judgment.

HALL, V.C.:—

I cannot admit the contention that where real estate and personal estate are comprised in the same mortgage the real estate must, under *Locke King's Act,* bear the whole mortgage debt. *Lipscomb* v. *Lipscomb* is apparently an authority that under such circumstances the mortgage debt must be borne rateably by the real and personal estate subject thereto, and I shall follow that case.

Solicitors: *R. Mayo; Walker & Battiscombe.*

(1) Law Rep. 7 Eq. 501. (2) Law Rep. 12 Eq. 540.

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BERRY *v.* BERRY.

V.-C. H.

1878

Jan. 15.

[1877 B. 254.]

Will—Devise—Estate of Trustees—Legal or Equitable—Contingent Remainder —Provision for Maintenance.

A testator devised lands to trustees, their heirs and assigns, to the use of *A.* for life, with remainder to the use of such child or children of *A.* as should attain twenty-one, as tenants in common in fee, with remainders over; and empowered the trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority.

A. died leaving four children, three adult and one an infant:—

Held, that the contingent remainder of the infant child of *A.* was equitable, and did not fail by reason of the death of *A.* before the remainder vested.

Statement.

EDWARD BERRY, by his will, dated the 13th of February, 1848, devised to trustees, their heirs and assigns, all his real estate, To hold to the trustees, "their heirs and assigns for ever, to the use of his nephew *Thomas Berry* and his assigns during his life," and after the determination of that estate "to the use of such child or children of the said *Thomas Berry* then born or thereafter to be born as should attain the age of twenty-one years" in equal shares as tenants in common in fee, and in case there should be no such child, then to the use of other persons as tenants in common in fee. The said testator thereby also directed that *Thomas Berry*, the tenant for life of the hereditaments devised by his will, should keep the buildings thereon in good repair and insured, and in case of his refusal or neglect so to do the testator authorized and empowered the trustees or trustee for the time being of his will to receive the rents and profits of the hereditaments thereby devised, and thereout to pay the costs of repairs, and to effect, and pay the premiums on, the requisite insurances, and to pay the residue of the rents and profits to *Thomas Berry*. The testator then bequeathed his personal estate upon trust for sale and conversion, and upon trust to lay out the net proceeds, after payment of his debts and legacies, in the purchase of other hereditaments held for an estate in fee simple, which he directed should be conveyed

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V.-C. H. 1878 BERRY v. BERRY. Statement.

"to the trustees for the time being of his will upon the trusts and for the intents and purposes in his will expressed concerning the real estates thereby devised," or such of the same as should be subsisting and capable of taking effect. And after further provisions not material to be stated, the testator "thereby empowered his said trustees or trustee to apply all or any part of the yearly income to which, under any of the devises, bequests, or dispositions thereinbefore contained, any infant devisee or legatee should be presumptively or otherwise entitled, towards the maintenance and education or otherwise for the benefit of such devisee or legatee during his or her minority," or at the option of the trustees to pay the same to the parent or guardian of such infant without being responsible for its application, and to invest the unapplied surplus (if any), with power to apply the income, or if necessary the capital of the fund, for the maintenance or advancement of the infant, and in the event of his or her attaining twenty-one the fund was to be his or her absolute property. The testator also appointed the same trustees executors of his will.

By a codicil to his will, dated the same day, the testator devised a piece of land which he had contracted to sell to a railway company, "unto and to the use of" the same trustees, their heirs and assigns, upon trust to complete the sale thereof, and to stand possessed of the sale moneys upon the trusts by his will declared concerning his personal estate.

The testator died in March, 1848; and *Thomas Berry* died in June, 1876, having had issue four children, of whom three had attained the age of twenty-one, and the fourth was an infant. The three adult children of *Thomas Berry* contended that the infant child, not having attained the age of twenty-one years in the lifetime of *Thomas Berry*, was not entitled to any share in the testator's real estate, and this action was brought by the infant child against the surviving trustee and the adult children for the purpose of having one-fourth of such real estate set apart and appropriated as his share under the said will, with proper provision for his maintenance thereout, and if necessary, of having the real and personal estate of the testator administered under the direction of the Court.

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W. Pearson, Q.C., and *Jason Smith*, for the Plaintiff:—

The trustees of the will have active duties to perform, and the purposes of the trust continue beyond the life of the tenant for life. The trustees therefore take the legal estate in fee simple under sects. 30 and 31 of the *Wills Act* (1 Vict. c. 26); and the nature of the duties which they have to perform shews that they must do so. In a certain event they are to receive the rents and profits of the hereditaments devised by the will, and thereout to pay the costs of repairs and insurance. Moreover, they are to apply the income to which any infant devisee may be presumptively entitled towards his maintenance. To have this command over the possession, rents, and income, they must necessarily take the legal estate: *Jarman* on Wills (1); *Lewin* on Trusts (2); *Shapland* v. *Smith* (3); *Silvester* v. *Wilson* (4). In such a case it is immaterial that there is no direct devise to the trustees if the intention that they shall take the estate can be collected from the will: *Doe* v. *Homfray* (5); *Doe* v. *Cafe* (6). If then the trustees take the legal estate the Plaintiff's contingent remainder is equitable, and does not fail by reason of the determination of the particular estate by the death of *Thomas Berry* before the vesting of such contingent remainder, and the Plaintiff is entitled to the relief he seeks by this action.

C. T. Simpson, for the Defendants:—

The devise in the will is to the trustees and their heirs to the use of other persons; and all the beneficial limitations are legal limitations. The provisoes with regard to the repairs, insurance, and maintenance are mere powers. Moreover, when the testator wished to give the trustees the legal estate he knew how to do so, for by his codicil he devised the land he had contracted to sell to the railway company "unto and to the use of" the trustees, their heirs and assigns, upon trust to carry out the contract. Where a testator, as here, clearly expresses his intention that trustees are to be mere conduit pipes to feed the uses, the Court cannot, to preserve a contingent remainder from destruction, hold that the

(1) 3rd Ed. vol. ii. pp. 269–272, 295.
(2) 6th Ed. p 187.
(3) 1 Bro. C. C. 74.
(4) 2 T. R. 444.
(5) 6 A. & E. 206.
(6) 7 Ex. 675.

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trustees take a legal estate in fee: *Cunliffe* v. *Brancker* (1); *Houston* v. *Hughes* (2). This gift being a contingent remainder cannot be treated as an executory devise: *Brackenbury* v. *Gibbons* (3).

Argument.

W. Pearson, in reply:—

It must be assumed that trustees are to discharge their duties by virtue of an estate and not of a mere power, and the devise to them in the will must be construed accordingly: *Watson* v. *Pearson* (4).

Judgment.

HALL, V.C.:—

I am of opinion that, on the proper construction of this will, the legal estate is vested in the trustees, and that the infant Plaintiff is entitled as a *cestui que trust* under the limitation contained in the will of the testator in favour of the children of his nephew *Thomas Berry*. I found my judgment on the provision for maintenance. It is unnecessary for me to decide whether or not the prior life estate given to *Thomas Berry* was legal or equitable. From the provision for maintenance I collect an intention that the trustees should, under the disposition to them, their heirs and assigns, take an estate by virtue and force of which they would without express direction receive and take the rents and profits of the property; and that this provision for maintenance constituted a trust of the rents and profits so taken by them, not merely by force and means of a power of entry and of taking the rents and profits, for such is not the clause, but by force and means of an estate vested in them under the devise, this provision being read as a mere direction for the application of the rents and profits which they take by virtue of their estate and interest. The estate which they so take is an estate in fee, and it is equally so whether considered with regard to the law as it existed before the *Wills Act*, or to the law as altered by sect. 31 of that Act.

With reference to the argument founded upon the codicil, if it be the true construction that under the will the tenant for life would take the legal estate, that would be enough to account for

(1) 3 Ch. D. 393.
(2) 6 B. & C. 403, 419.
(3) 2 Ch. D. 417.
(4) 2 Ex. 581.

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the devise in the codicil to the use of the trustees, their heirs and assigns, upon trust to complete the contract for sale therein mentioned. But if, on the other hand, that be not the true construction, it is not, to my mind, enough to shew that all the limitations contained in the will were to be legal limitations. For, even supposing the whole legal fee to have been vested in the trustees under the will, still it would not be an unnatural or unreasonable mode of making provision for carrying into effect a contract, for the testator, instead of merely directing the trustees to carry the contract into effect, and leaving them to do so by virtue of the devise to them in the will, to introduce into the codicil an express devise to the trustees for that purpose. There must, accordingly, be a declaration that, under and according to the true construction of the will of the testator, the children of *Thomas Berry* take equitable estates in the hereditaments thereby devised, and that the Plaintiff, as one of such children, is, contingently on his attaining twenty-one, entitled to one-fourth part of such hereditaments, with the benefit of the provisions in the will contained for the advancement and maintenance of such children, and the accumulation of the surplus income.

Solicitors: *Roscoe, Hincks, & Sheppard*, agents for *Deacon & Wilkins, Peterborough; Cowdell, Grundy, & Browne*, agents for *Wartnaby & Gilbert, Market Harborough.*

In re NORTH YORKSHIRE IRON COMPANY.

V.-C. H. 1878 Jan. 19.

Winding up—Leasehold Premises, Retention of, by Company—Convenience of the Winding-up—Rent accrued before Commencement of the Winding-up—Rent accrued after—Leave to distrain.

A company in course of liquidation retained for the convenience of the winding-up the possession of leasehold premises of which they were in occupation as assignees of a lease containing the usual proviso for re-entry by the lessors:—

Held, that leave should be given to the lessors to distrain for rent accrued due after the commencement of the winding-up, but not for rent accrued due before that time, as to which they must prove as creditors in the winding-up.

Statement.

THE *North Yorkshire Iron Company, Limited*, was ordered to be wound up on the 16th of June, 1876. At that time the company

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V.-C. H. 1878

In re NORTH YORKSHIRE IRON COMPANY.

Statement.

were tenants in occupation of certain leasehold premises (on which they carried on their business), as assignees of a term, of which about twelve years were unexpired, created by an indenture which contained the usual power for the lessors to re-enter on non-payment of rent. The iron trade being in a very depressed state, the liquidator continued in possession of the leasehold premises with the view to selling them and the plant, stock, and business of the company as a going concern. No offer to surrender the lease had been made on behalf of the company.

The lessors now applied by summons in the winding-up for liberty, notwithstanding the winding-up order, to distrain for arrears of rent due to them both before and after the commencement of the winding-up.

Argument.

Robinson, Q.C., for the lessors, in support of the application:—

I cannot contend in the face of the authorities that leave will be given to distrain in respect of the rent which accrued due before the commencement of the winding-up: as to such rent therefore I admit that the applicants must prove in the winding-up: *In re Traders' North Staffordshire Carrying Company* (1); *In re Coal Consumers Association* (2). But as to rent which has accrued due since that time, for which they cannot prove in the winding-up, they are clearly entitled to come to the Court for leave to distrain: *In re Exhall Coal Mining Company* (3).

In *In re Progress Assurance Company* (4), where possession was retained for the benefit of all parties, and the distress was held to be illegal under the 163rd section of the Act of 1862, Lord *Romilly*, M.R., said that there was an exception to the operation of the section where the company has retained actual possession of the property for the purpose of carrying on the business of the liquidation; and that has been the case here.

The 87th section of the Act of 1862, providing that after the winding-up order no proceedings shall be proceeded with, "except with the leave of the Court," and the 163rd section, making void any distress put in force after the commencement of the winding-up, must be read together; and, as Lord Justice *Turner* observed in *In re Exhall Coal Mining Company* (3), the latter section only

(1) Law Rep. 19 Eq. 60.
(2) 4 Ch. D. 625.
(3) 4 D. J. & S. 377.
(4) Law Rep. 9 Eq. 370.

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avoids a distress when leave has not been given under the former. It is clear that the Court can give leave to distrain; this is the very case in which that leave should be given; and there should be a reference to Chambers to ascertain the amount of rent due before and after the commencement of the winding-up. He also referred to *Horsey's Claim* (1) and *In re Haytor Granite Company* (2).

Argument.

Dickinson, Q.C., and *H. A. Giffard*, for the liquidator:—

Upon the result of the authorities, rent accrued before the commencement of the winding-up is to be regarded as a debt in respect of which a landlord cannot distrain, but has a mere right of proof as a creditor.

As to rent accrued after the commencement of the winding-up, the circumstances under which possession is retained by the company must be considered. If the premises are retained, not as an asset of the company, but for the purpose of carrying on the business of the company, so that a benefit to the estate is gained, then it is only fair that the landlord should be allowed to recover his rent as such. And this was the case put by Lord *Romilly*, M.R., in *In re Progress Assurance Company* (3), as the only exception to the operation of sect. 163.

But if, as in this case, possession is retained of the premises as an asset, and the landlord, having the power of recovering possession by re-entry, has not chosen to do so, then he ought not to be permitted to distrain: *In re Traders' North Staffordshire Carrying Company* (4); *In re Lundy Granite Company* (5); *In re Universal Disinfector Company* (6).

In the case put by Lord Justice *James* in *In re Lundy Granite Company*, the lessor was not able to recover possession; while *In re Haytor Granite Company* was a case in which the leaseholds in question had been sold in the winding-up.

HALL, V.C.:—

Judgment.

It is clearly settled that the Court may, notwithstanding the 163rd section of the *Companies Act*, 1862, give, under sect. 87 of

(1) Law Rep. 5 Eq. 561.
(2) Ibid. 1 Ch. 77.
(3) Ibid. 9 Eq. 370.
(4) Law Rep. 19 Eq. 60.
(5) Ibid. 6 Ch. 462.
(6) Ibid. 20 Eq. 162.

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V.-C. H. 1878

In re NORTH YORKSHIRE IRON COMPANY.

Judgment.

that Act, leave to distrain: as appears from the judgment of Lord Justice *James* in *In re Lundy Granite Company* (1). The question is in what cases that leave should be given. Leave will not be given for rent accrued due before the winding-up. That was decided in *In re Traders' North Staffordshire Carrying Company* (2) and *In re Coal Consumers Association* (3). As to such rent, the creditor must prove in the winding-up. Therefore, in the present case I cannot give leave to distrain for the rent accrued due before the commencement of the winding-up. As to subsequent rent, the late Master of the Rolls, in the *Progress Assurance Company* (4), refused leave to distrain, considering that upon the evidence the company had, after the winding-up, retained possession for the benefit of all parties. In *In re Lundy Granite Company* Lord Justice *James* says (5): "But in some cases between the landlord and the company, if the company for its own purposes and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estates for their own purposes, they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it." Lord Justice *Mellish* says (6): "I agree. If the official liquidator, for the convenience of the winding-up, does not surrender the lease, but continues to keep possession for the purpose of obtaining a better price for the goods, the landlord should not be deprived of his right to recover his rent."

I think that in the present case the retaining of possession has, to use the words of Lord Justice *Mellish*, been "for the convenience of the winding-up," and that the distress for the rent subsequent to the winding-up should be allowed. It was said in argument that the landlord might have recovered possession under the power of re-entry contained in the lease, and that, not having

(1) Law Rep. 6 Ch. 466.
(2) Ibid. 19 Eq. 60.
(3) 4 Ch. D. 625.
(4) Law Rep. 9 Eq. 370.
(5) Ibid. 6 Ch. 466.
(6) Ibid. 467.

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taken that course, he should not be allowed to distrain; and Lord Justice *James*, in the passage of his judgment last mentioned, does mention the circumstance of the lessor not being able to obtain possession, but Lord Justice *Mellish* did not in his judgment mention the inability of the landlord to recover possession as being necessary to his having leave given to him to distrain, and there is no authority to that effect. In exercising the discretion of the Court in the present case, seeing that there has not been an offer by the company to surrender, and that the company has not desired a determination of the tenancy, but has wished to retain possession and to dispose of the concern as a going concern, I do not think that I should, by reason of the existence of the power of re-entry, refuse the leave to distrain. The applicants will have their costs of the summons from the liquidator, and the liquidator will have these and his own costs out of the estate; and there must be an inquiry to ascertain the amount due for rent at the commencement of the winding-up, and the amount which has since accrued due.

V.-C. H. 1878 *In re* North Yorkshire Iron Company. Judgment.

Solicitors: *Hollams, Son, & Coward; Bower & Cotton*, agents for *Dodds, Stockton-on-Tees.*

In re SMITH'S TRUSTS.

V.-C. H. 1878 *Feb.* 8.

Will—Construction—Original Gift—Issue of Child who might be dead "leaving Issue."

Where there is a testamentary gift to such of a class as might be living at the death of a tenant for life, and the issue of such of them as might be then dead "leaving issue," the issue of such members of the class as die leaving any issue will take whether they survive their parent or not.

The *dictum* of *Kindersley*, V.C., in *Lanphier* v. *Buck* (1) on this point disapproved.

PETITION.

Statement.

The testator, *Haskett Smith*, who died on the 25th of February, 1840, by his will, dated the 25th of July, 1834, devised all his hereditaments at or near *Sydenham* to trustees to the use of his son *William Smith* for life, with remainder to his first and other

(1) 2 Dr. & Sm. 499.

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V.-C. H. 1878 *In re* SMITH'S TRUSTS. Statement.

sons in tail male, and in default of such issue to the use of the trustees and their heirs, upon trust upon the death of his said son and such failure of his issue as aforesaid to sell the said hereditaments, and he declared that the trustees should stand possessed of the sale moneys in trust to pay and divide the same "unto and between or amongst such one or more of his children as might be living at the decease of his said son *William* without male issue as aforesaid, and the issue of such of his said children as might be then dead leaving issue," equally to be divided between such child, children, and issue, share and share alike, such issue nevertheless to stand in the place of their parent, and to take equally between them, if more than one, the share which their parent would otherwise be entitled to.

The testator left his son *William* and two other children, one of whom was *Mary Ann Malin*, him surviving. *William* died without issue in August, 1876. *Mary Ann Malin* died on the 16th of July, 1872, having had two children, who survived the testator, viz., Mrs. *Chilton*, who died on the 3rd of May, 1861, and Mrs. *Farquhar*, who was still living.

The question having been raised whether Mrs. *Chilton*, who predeceased her mother, could take under the testator's gift to the issue of such of his children as might at the death of his son *William* be dead "leaving issue," the trustees of the will paid the part of the purchase-money of the hereditaments sold which represented the share of Mrs. *Chilton* into Court, under the *Trustee Relief Act*, and her representatives now petitioned for the payment out to them thereof.

Argument.

Dickinson, Q.C., and *Bardswell*, for the Petitioners:—

This is an original and not a substitutional gift, and the authorities have now established that in the case of such a testamentary gift to the issue of a person who shall have died or may be dead "leaving issue," the parent must leave some issue surviving him, but if he leaves one, then all his issue take whether they survive the parent or not: *Martin* v. *Holgate* (1); *Bolton* v. *Beard* (2); *In re Orlebar's Settlement Trusts* (3); *M'Lachlan* v. *Taitt* (4). *In*

(1) Law Rep. 1 H. L. 175.
(2) 3 D. M. & G. 608.
(3) Law Rep. 20 Eq. 711.
(4) 2 D. F. & J. 449.

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re Orlebar's Settlement Trusts (1) is not touched by *Selby* v. *Whittaker* (2). The only possible doubt is caused by a *dictum* of Vice-Chancellor *Kindersley* in *Lanphier* v. *Buck* (3), but the actual decision itself was in favour of our contention, and this *dictum* cannot be regarded in the face of the actual decisions the other way. The representatives of Mrs. *Chilton* are accordingly entitled to have the fund in Court paid out to them.

Argument.

O. L. Clare, for the Respondents, who were persons representing the share of Mrs. *Farquhar*, submitted that the *dictum* in *Lanphier* v. *Buck* was precisely in point. In that case Vice-Chancellor *Kindersley* said: "I must, however, observe with reference to this point, that there are cases where, although the gift to the issue (or children) is an original gift, the testator has by his language precluded children from taking who did not survive their parent. Thus, if the gift had been to such of the nephews and nieces as should be living at the happening of a certain event, and to the issue of such of the nephews and nieces as should have previously died leaving issue; those words would be a sufficient indication of the testator's intention, that such children only as were left by their parent, that is, as survived their parent, should take."

HALL, V.C.:—

Judgment.

After the different decisions referred to, to which I may add the decision in *In re Pell's Trusts* (4), one of the authorities which settled the disputed point as to the necessity of the party to take surviving the tenant for life (I do not say his own parent), a point as to which there had been great difference of opinion, Lord Justice *Knight Bruce*, considering that the party to take must survive, I think it would not be sound reasoning to say that if there be a gift to the issue of children who shall have died leaving issue, the only objects of the trust are the issue that are surviving. To hold that because the expression "leaving issue" is used, the issue who are left surviving are the only issue who can take, would be to introduce into the words descriptive of the issue

(1) Law Rep. 20 Eq. 711.
(2) 6 Ch. D. 239.
(3) 2 Dr. & Sm. 499.
(4) 3 D. F. & J. 291.

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V.-C. H. 1878 *In re* SMITH'S TRUSTS. Judgment

the word "surviving," or other words limiting the issue to those who survive their parent, the word "leaving" being applicable only to the parent. In many cases—and if you read it thus in one you must so read it in all—the consequence would be to leave totally unprovided for persons who would be reasonable objects of the testator's bounty. I therefore consider that keeping to the words of this trust, which, it must be remarked, is an original gift, I must hold, upon the authorities, that the issue of children take without regard to the question whether they (the issue) do or do not survive the parent, if any issue survive the parent. I say that the *dictum* in *Lanphier* v. *Buck* (1) will not be followed by me unless it should receive the approval of the Court of Appeal. I come to this conclusion after considering the cases of *Crause* v. *Cooper* (2) and *In re Bennett's Trusts* (3), before Vice-Chancellor *Wood*, which were in reality decided while the cases bearing on the question now before the Court were in a very unsettled state, and in which the Vice-Chancellor, looking, as I collect, to the then state of the authorities, certainly seems to have adopted the view that the party to take must survive his own parent.

Solicitors: *Burton, Yeates, & Hart.*

(1) 2 Dr. & Sm. 499. (2) 1 J. & H. 207.
(3) 3 K. & J. 280.

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SHAW *v.* FORD.

FRY, J.

1877

Nov. 13, 28.

[1874 S. 120.]

Will—Construction—Executory Devise—Alteration of Devolution of Estate at Moment of Devolution only—Condition repugnant to prior Gift.

A testator devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund and be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. And, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, and afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren and to their heirs and assigns, to be divided equally among them:—

Held, that the four sons took the houses as tenants in common in fee, and that the executory devise over to their children was void.

The rules which regulate the validity of executory devises discussed.

Statement.

WILLIAM SHAW, by his will, dated the 31st of March, 1836, devised as follows:—

"I do hereby give, devise, and bequeath unto my four sons, *Thomas Shaw*, *John Shaw*, *William Shaw*, and *Jesse Shaw*, share and share alike, all and every of those my thirteen dwelling-houses situate in *Wood Street* and *Perry Bank*, *Lane End*, in the parish of *Stoke-upon-Trent*, together with a pew in the south aisle of *Lane End Church*, to have and to hold subject to the following conditions: First, it is my will and desire that none of the aforementioned houses or lands, with the exception of my large garden in *Perry Bank*, be disposed of either by division, assignment, transfer, or sale, without the written consent and approbation of each and every of them my four sons, *Thomas Shaw*, *John Shaw*, *William Shaw*, and *Jesse Shaw*, their heirs, assigns, or representatives. Secondly, it is my will and desire that, if need be, the

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afore-mentioned garden be sold to meet contingent expenses: and furthermore, it is my will and desire that, until the before-mentioned distribution of the property is made, the rents and proceeds shall come into one common fund, and be divided equally amongst my four sons, *Thomas Shaw*, *John Shaw*, *William Shaw*, and *Jesse Shaw*, namely, at Midsummer and Christmas, first deducting all reasonable and necessary charges for the proper maintenance and good repair of the aforesaid property, which repairs are to be deducted out of the rents. Furthermore, it is my will and desire that, if there should be no lawful distribution of this my property during the natural life of them my four sons, *Thomas Shaw*, *John Shaw*, *William Shaw*, and *Jesse Shaw*, it shall then devolve to the children lawfully begotten of them my four sons. And, in case any of these my four sons should die without issue, then it is my further will and desire that the half-yearly share of the rents so possessed or intended to be possessed by them or him shall in that case devolve to the widow or widows of such deceased son or sons, to be by them received and enjoyed so long as they retain their widowhood, and afterwards it shall devolve to the survivor or survivors of my other sons, that is to say, to my grandchildren and to their heirs and assigns, to be divided equally amongst them, share and share alike . . . . And, as to all the rest, residue, and remainder of all my estate and effects whatsoever and wheresoever not hereinbefore effectually disposed of, I do hereby give, devise, and bequeath the same to be equally divided amongst my four sons, *Thomas Shaw*, *John Shaw*, *William Shaw*, and *Jesse Shaw*, share and share alike." And the testator appointed his sons *Thomas Shaw* and *John Shaw* executors of his will. The testator died in August, 1837, and his will was afterwards proved by the executors. All the four sons survived him. By a deed dated the 4th of October, 1838, and made between *Jesse Shaw* and *Eleanor* his wife of the first part, *John Shaw* of the second part, *William Shaw* of the third part, *Thomas Shaw* of the fourth part, and *Frederick Bishop* of the fifth part, and duly acknowledged by *Eleanor Shaw*, *Jesse Shaw* (with the written consent of *Thomas*, *John*, and *William*) granted, and *Eleanor Shaw* released to *Bishop* and his heirs, the undivided share of *Jesse Shaw* under the will of the testator in the thirteen dwelling-

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houses, with the land thereunto belonging, to hold the same unto *Bishop* and his heirs, to the use of *Thomas Shaw*, his heirs and assigns for ever. And by the same deed *Thomas Shaw* (with the written consent of *John*, *William*, and *Jesse*) granted unto *Bishop* and his heirs all the undivided share of *Thomas* under the will of the testator in the same hereditaments, to hold the same unto *Bishop* and his heirs, to the use of *Thomas Shaw*, his heirs and assigns for ever. *William Shaw* died in 1846 intestate, leaving the Plaintiff *George Shaw*, his eldest son, and three other children him surviving. *John Shaw*, by his will, dated the 3rd of February, 1851, devised all his real estate to trustees on certain trusts, and he died on the 4th of November, 1853. *Thomas Shaw*, by his will, dated the 14th of September, 1858, devised his real estate to trustees on certain trusts for the benefit of his wife and children, and he died in 1859.

Statement.

The bill in the suit was filed in April, 1874, by *George Shaw* against grandchildren and great-grandchildren of the testator, and it prayed that the rights and interests of all parties interested in the thirteen houses, with the land attached thereto (other than the garden at *Perry Bank*), devised by the testator's will, might be ascertained and declared by the Court; that the houses might be sold under the direction of the Court, and the proceeds of sale divided among the persons interested therein according to their respective interests, or that a partition of the property might be made.

Argument.

Fischer, Q.C., and *H. M. Williams*, for the Plaintiff and Defendants in the same interest:—

The four sons took the thirteen houses as tenants in common in fee, and the executory devise over is void: *Shailard* v. *Baker* (1); *Muschamp* v. *Bluet* (2); *Holmes* v. *Godson* (3); *In re Stringer's Estate* (4); *Jarman* on Wills (5).

Dryden, for grandchildren:—

The sons took only estates for life, with remainder to their children in fee. The result of the Plaintiff's contention is to

(1) 2 Cro. Eliz. 744.
(2) Sir J. Bridg. 132.
(3) 8 D. M. & G. 152.
(4) 6 Ch. D. 1.
(5) 3rd Ed. vol. ii. p. 265.

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make several parts of the will inoperative. The testator is dealing at one time with corpus and at another with income, and this has created a confusion. "Lawful distribution" must be taken to refer to a physical distribution, as, for instance, by a partition.

Argument.

Sladen, for another grandchild:—

Nothing is more common than an executory devise over in the event of the first taker having no children. Though there is no express gift of life estates to the sons, the intention evidently was to give estates in fee to the grandchildren.

Fischer, in reply:—

"Lawful distribution" refers not only to a physical distribution, but to a severance by a sale or by a devise by will.

Judgment.

Nov. 28. FRY, J.:—

The question in this case arises on the will of a testator of the name of *William Shaw*, and it is shortly this: whether or not a certain executory devise is valid or invalid, the Plaintiff asserting its invalidity, and some of the Defendants asserting its validity. [His Lordship stated the provisions of the will, and continued:—]

Now, the first question is what estate do the four sons take in this specifically devised property, before we come to that portion of the will which gives it over in the event of there being no lawful distribution? In my opinion the sons take estates as tenants in common in fee simple. I think that it is clear they take, if at all, as tenants in common, because they are to take "share and share alike." The only question which requires any attention is, whether they take for life or in fee simple. I am of opinion that the expression of the testator's desire that none of the houses be disposed of either "by division, assignment, transfer, or sale without the written consent of each and every of the four sons, their heirs, assigns, or representatives," shews that the testator considered the heirs of the four sons as having an estate in the property, which they could only have in the event of its being a fee simple estate. There is, in my opinion, a devise of this particular property to the four sons as tenants in common in fee.

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Then comes the devise over which I have already read. It will be observed that the terms are, "if there should be no lawful distribution of this my property during the natural life of these my four sons," and then it is given over in a certain way the details of which I will not repeat.

Now, it is to be observed that the period during which the contingency there referred to may arise is "the natural life of the four sons," that is to say, the period of the joint lives of all the four sons. The next inquiry is, what is the nature of the event which constitutes the contingency upon which the executory devise is to take effect. It is if there is no lawful distribution of the property amongst the four sons, in other words, in the absence of a partition during their joint lives. Now the right of all the tenants in common of an estate is, if they so think fit, to enjoy it, not in severalty, but as tenants in common of an undivided estate; and therefore the contingency, in its nature, is the exercise of a right which attaches to every tenant in common of an undivided estate.

The next inquiry is, at what period is that executory devise over to take effect, if at all. The answer is that it is to take effect at the death of each of the four sons. It is quite true, as I have already pointed out, that the period during which it may arise is that of the joint lives, and therefore it will take effect with regard to the son who dies first at the very moment when the contingency is determined, but with regard to the other sons the contingency will be determined at an earlier period than their deaths, though the devise will come into operation at the death of each of them respectively.

Now that being so, I have to inquire what are the general principles of law applicable to such a case? They may, I conceive, be stated in this way. *Primâ facie*, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety

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between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Gulliver* v. *Vaux* (1); *Holmes* v. *Godson* (2); and *Ware* v. *Cann* (3). Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley* v. *Peixoto* (4), *Ross* v. *Ross* (5), and *In re Yalden* (6). It is true that in some of the earlier cases, such as *Doe* v. *Glover* (7) and *Watkins* v. *Williams* (8), a distinction was taken between realty and personalty, but that was overruled in *Holmes* v. *Godson*, and it never had anything in the nature of principle or reason to support it. I think, therefore, that these exceptions to the general rule are well established.

That being so, it only remains to be observed that the executory devise in the present case is within both of these exceptions. It is within the first, because, as I have pointed out, although the period during which the contingency is to be determined is that of the joint lives of the four sons, the time at which the devise over is to take effect is the death of each of the sons, that is, the moment when the estate devolves. It takes effect at the moment

(1) 8 D. M. & G. 167, n.
(2) Ibid. 152.
(3) 10 B. & C. 433.
(4) 3 Ves. 324.
(5) 1 Jac. & W. 154.
(6) 1 D. M. & G. 53.
(7) 1 C. B. 448.
(8) 3 Mac. & G. 622.

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of devolution, but at no other time, and altering, as every executory devise must alter, the course of devolution, it is bad upon that ground. It is equally bad under the second exception, because the event upon which it is to take effect is the exercise of a right which is incident to the estate in fee simple already given to the tenants in common, namely, the right to enjoy without alienation. It is bad as being a gift over upon the exercise of that right.

For these reasons I hold that the Plaintiff's contention is correct. I make a declaration to the effect that the devise over is bad, and that the four sons took estates as tenants in common in fee simple. There will be a decree for sale and distribution of the fund.

Solicitors: *H. G. Field; C. G. Scott.*

McKENZIE *v.* HESKETH.

[1876 M. 130.]

Specific Performance—Mistake—Compensation.

The Plaintiff offered to take a lease of a farm belonging to the Defendant at a rent of £500 per annum, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 249 acres. The Defendant's agent desired to let only 214 acres with this farm, but he accepted the Plaintiff's offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the Defendant's agent admitted in examination that he thought the Plaintiff had tendered for the same quantity of land as the former tenant. The Plaintiff commenced an action for specific performance against the Defendant, and was willing to take a lease of the 214 acres at a proportionately reduced rent:—

Held, that the Defendant must grant the Plaintiff a lease of 214 acres at a rent reduced from £500, in the proportion of 214 to 235.

THIS was an action to enforce specific performance of an alleged agreement by the Defendant, Sir *T. G. F. Hesketh*, to grant a lease of a farm to the Plaintiff.

The Defendant was the tenant for life in possession, with powers of leasing, of an estate called the *Easton Neston* estate, in *Northamptonshire*. In December, 1875, and January, 1876, Mr. *Frederick*

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Gray, the Defendant's agent, on his behalf, issued advertisements in the newspapers inviting tenders for the leases of some of the farms on the estate. By these advertisements applicants for leases were directed to apply for particulars of the farms to Mr. *A. E. Greville*, the Plaintiff's solicitor, at *Towcester*, and printed forms of tender were prepared containing the conditions of letting, and in which blanks were left for inserting the name, situation, and acreage of the farm tendered for. In each tender there was a schedule intended to be filled up with a detailed description of the land comprised in the farm, with the culture and acreage of each field. The first two pages of the tender contained the name and general description of the farm and the terms of letting, the third page contained the schedule, and the fourth page contained the form of tender which was to be filled up by the person making the tender with his name and the amount of rent which he offered. It was intended that the description of the farm on the first page and the schedule should be filled up before the form of tender was issued by Mr. *Greville*. Before issuing the advertisements Mr. *Gray* had consulted the Plaintiff, who was a land surveyor, and a Mr. *Dean*, another surveyor, with regard to the re-arrangement of the farms before the proposed letting. One of the farms proposed to be let was called the *Wood Burcote Farm*, and was in the occupation of a Mr. *Ayers*, whose tenancy was about to expire at Michaelmas, 1876. This farm consisted of 214A. 1R. 13P. lying altogether, and *Ayers* also occupied some outlying parcels of land containing 21A. 0R. 38P. Mr. *Dean* advised the Defendant that these outlying parcels should be taken away from this farm, and that only the 214A. 1R. 13P. should be let to the next tenant. The Plaintiff advised that the outlying parcels should be taken away, but that in lieu of them two adjoining fields, containing respectively 18A. 3R. 26P. and 16A. 2R. 7P., which had respectively previously formed part of two farms known as *Manning's Farm* and *Elliott's Farm*, should be added to the *Wood Burcote Farm*, making the total acreage thereof 249A. 3R. 6P.

The printed forms of tender were ordered by the Plaintiff, and were, after they were printed, forwarded by him to Mr. *Gray*. It appeared, however, that the Plaintiff retained one of the printed forms in his own possession. Two tenders were sent in for the

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Wood Burcote Farm, one by the Plaintiff and one by *Ayers*. The Plaintiff's tender commenced as follows:—"Particulars and terms of letting the *Wood Burcote Farm*, situate on the *Easton* estate, in the parishes of , in the county of *Northampton*, containing homestead and about 249A. 3R. 6P. of land, with appurtenances, now in the occupation of Mr. *John Ayers*." The schedule was filled up with the descriptions and acreage of the several fields comprising the farm, and in it were included the two fields containing respectively 18A. 3R. 26P. and 16A. 2R. 7P., which the Plaintiff had advised should be added to the farm, but the two outlying parcels occupied by *Ayers* were excluded. The total acreage was stated to be 249A. 3R. 6P. The tender on the fourth page was: "I, *Alexander McKenzie*, do hereby offer the sum of £500 rent per annum for the farm known as the *Wood Burcote Farm* on the *Easton Weston* estate, *Northamptonshire*, with appurtenances, as described in the foregoing schedule, subject to the conditions specified." This was signed by the Plaintiff, and was dated the 21st of January, 1876. The blanks in the form and the schedule had been filled up by the Plaintiff himself. The tender of *Ayers* was for the farm as he held it with the outlying parcels, making a total acreage of 235A. 2R. 11P., and his offer was a rent of 37*s*. per acre. The tenders were opened on the 2nd of February, 1876, and *Dean* made a calculation for the assistance of *Gray*, shewing that the rent offered by *Ayers* came to £436 12*s*. *Gray* assumed that the Plaintiff's offer of £500 was for the same land, and on the 3rd of February Mr. *Greville*, by *Gray's* direction, wrote to the Plaintiff, informing him that his tender had been accepted. When Mr. *Gray* determined to accept the Plaintiff's tender he had only looked at the name of the farm tendered for and at the rent offered, and he was not aware that the Plaintiff had included in his tender the two fields formerly let as part of *Manning's* and *Elliott's Farms*. Mr. *Gray* had already agreed to let the field of 16A. 2R. 7P. (formerly *Elliott's*) to another person. The error was discovered the next day, and Mr. *Greville* then informed the Plaintiff of it, and suggested that he should make another tender. The Plaintiff insisted on his agreement, and commenced the action to enforce specific performance.

By his statement of defence the Defendant denied that he, or

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any one authorized on his behalf, ever agreed to grant such a lease as that claimed by the Plaintiff, and said that it was not intended by *Gray* or *Greville* that the tenders for the *Wood Burcote Farm* should be accepted except for the 214A. 1R. 13P.

This was the trial of the action. *Gray* was examined as a witness, and said that he intended to let only the 214A. 1R. 13P. as the *Wood Burcote Farm*. But he admitted that he did not look at the amount of the acreage for which the Plaintiff tendered, and said that he supposed that his tender was for the same quantity as that for which *Ayers* had tendered; and that he accepted the Plaintiff's tender simply because the rent offered by him was higher than that offered by *Ayers*.

Argument.

Cookson, Q.C., and *Ratcliffe*, for the Plaintiff:—

If the Defendant's agent made a mistake, that is no reason why the contract should not be enforced. If a contract is ambiguous in its terms it may be a good defence to an action for specific performance that the Defendant understood it in a different sense from the Plaintiff: *Manser* v. *Back* (1). But the Plaintiff's tender was free from any ambiguity, and it is no defence that the Defendant's agent did not read it, or misunderstood its meaning: *Swaisland* v. *Dearsley* (2). *Wycombe Railway Company* v. *Donnington Hospital* (3) does not conflict with those decisions. At law, if a mistake had been made by the agent, the principal would be liable in an action of tort: *Seymour* v. *Greenwood* (4); *Limpus* v. *London General Omnibus Company* (5). In *Alvanley* v. *Kinnaird* (6) a mistake had been made by the vendor's agent as to whether some mines were to be included in the property sold, and it was held that the purchaser was entitled, if he wished it, to have specific performance of the contract excluding the mines. The present Plaintiff desires to have a lease of the 214 acres, with compensation by means of an abatement in the rent of £500 in the proportion which 214 bears to 249: *Leslie* v. *Tompson* (7). The *onus* is on the vendor to shew why the contract should not be performed.

(1) 6 Hare, 443, 447.
(2) 29 Beav. 430.
(3) Law Rep. 1 Ch. 268.
(4) 6 H. & N. 359; 7 H. & N. 355.
(5) 1 H. & C. 526.
(6) 2 Mac. & G. 1.
(7) 9 Hare, 268.

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[FRY, J., referred to *Malins* v. *Freeman* (1).]

North, Q.C., *Bury*, and *Mugliston*, for the Defendant:—

[FRY, J.:—Can you resist a decree for specific performance, taking 235A. 2R. 11P. as the basis for a rent of 500?]

We cannot assent to that.

[*Ratcliffe*:—The Plaintiff is willing to take a decree in that form.]

The case is one of mutual mistake; the parties never meant the same thing.

[FRY, J.:—The Plaintiff being willing to take the less quantity at a proportionate reduction of the rent, does not *Alvanley* v. *Kinnaird* (2) shew that he is entitled to a decree to that extent?]

In *Alvanley* v. *Kinnaird* the decree was made without compensation.

[FRY, J.:—I do not see the equity for that in the present case. It is a mere question of acreage.]

The mistake is a complete answer to an action for specific performance: *Swaisland* v. *Dearsley* (3). The form of the tender justified the mistake. If there was a mistake it is immaterial, except on the question of costs, whose conduct led to it. And the result is the same whether the Defendant can or cannot perform the contract in part. The question is whether anything at all like the contract which was made can be performed. We do not, of course, object to give the Plaintiff a lease of the 214 acres at a rent of £500. Either there was no contract in the present case, because the parties were never *ad idem*, or the mistake was of such a nature that a Court of Equity will not enforce specific performance. If by reason of a mistake the actual contract was not that which was intended by one of the parties, the Court will not substitute a different contract: *Calverley* v. *Williams* (4); *Wycombe Railway Company* v. *Donnington Hospital* (5); *Webster*

(1) 2 Keen, 25.
(2) 2 Mac. & G. 1.
(3) 29 Beav. 430.
(4) 1 Ves. 210.
(5) Law Rep. 1 Ch. 268.

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v. *Cecil* (1); *Day* v. *Wells* (2); *Garrard* v. *Frankel* (3); *Wood* v. *Scarth* (4).

[FRY, J.:—Is there any reported case in which it has been held that mistake is a complete answer to a suit for specific performance, when the mistake is with reference to a matter which, if there were no mistake, would be a proper subject for compensation? *Bloomer* v. *Spittle* (5).]

The Plaintiff says he agreed to take 249 acres, at a rent of £500; the Defendant's agent says he only consented to let 214 acres, for £500. Why should the Defendant be compelled to let more than his agent consented to let at that rent? If I am to let 235 acres, I ought to have compensation. It is impossible to adjust the compensation fairly to both sides.

Cookson, in reply:—

The mistake of one party to the contract is not a sufficient defence: *Smith* v. *Hughes* (6); *Pollock* on Contracts (7). All cases of compensation must be cases of mistake. I only ask for 214 acres, though I am willing to take 235, and I ask that the rent may be apportioned by a simple rule of three sum. The mistake does not affect the *corpus* of the contract, and therefore it is a fit subject for compensation: *Powell* v. *Elliot* (8).

[FRY, J.:—The Court seems to have dealt with contracts made by agents more tenderly than with contracts made by principals.]

An agent will not be permitted to blunder with impunity where a principal would not. The principal has his remedy against his agent.

Judgment.

FRY, J.:—

The Plaintiff sues for the specific performance of an agreement for a lease which, he says, was contained in a tender made by him and a letter of acceptance written by the Defendant's agent. Two questions arise—1. Whether there was any concluded contract between the parties; 2. Whether, if there was a concluded con-

(1) 30 Beav. 62.
(2) Ibid. 220.
(3) Ibid. 445.
(4) 2 K. & J. 33, 42.
(5) Law Rep. 13 Eq. 427.
(6) Ibid. 6 Q. B. 597.
(7) Page 394.
(8) Law Rep. 10 Ch. 424.

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tract, there was such a mistake on the part of the Defendant's agent as will justify the Defendant in resisting the specific performance of the contract. The tender was made upon a printed form which had been prepared by the Plaintiff himself, and was adopted by Mr. *Gray*, who was acting as the Defendant's agent. [His Lordship referred to the Plaintiff's tender, and the letter of acceptance of the 3rd of February, 1876, and the other facts above stated, and continued:—]

The only argument which can be adduced by the Defendant to shew that there was no concluded contract is that the whole 249 acres is described in the Plaintiff's tender as being land in the occupation of *Ayers*, but I do not think it is a tenable argument. The land for which the Plaintiff tendered was fully described in detail by its proper acreage, and no person reading the instrument with due care and with a knowledge of the surrounding facts could have had any doubt what it was for which the Plaintiff was tendering. I think, therefore, that there was a valid contract concluded between the parties.

The second question is a more difficult one. It appears to me that Mr. *Gray* was the agent of the Defendant for the purpose of determining whether this farm should be let to the Plaintiff or not; he was acting under a power of attorney, and he was assisted by Mr. *Greville* and Mr. *Dean*. A great number of tenders were opened on that day, and they were all, as I conclude from the evidence, opened by Mr. *Gray* himself. Before the Plaintiff's tender was opened, one of the closes comprised in it, containing upwards of sixteen acres, had been let to another person, and it was, therefore, impossible that it could be let to the Plaintiff. There were only two tenders for the *Wood Burcote Farm*, viz., those made by *Ayers* and the Plaintiff. *Ayers'* tender was opened first, and it was a tender for the *Wood Burcote Farm* and 235A. 2R. 11P. of land, and he offered to pay a rent of 37*s.* per acre. That offer was considered and thought insufficient. Then the Plaintiff's tender was opened, but the amount of acreage for which he offered was not looked at or considered at all. This was very culpable negligence on the part of the Defendant's agent. The Plaintiff's offer of a rent of £500 was considered. Mr. *Dean* made a calculation and came to the conclusion that *Ayers'* offer would give a total rent

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of £436. This amount was compared with the Plaintiff's offer of £500, and Mr. *Gray* at once determined to accept the Plaintiff's offer, and he then authorized Mr. *Greville* to write the letter of acceptance. Mr. *Gray's* evidence was distinct that he supposed that the Plaintiff was tendering for the same thing as that which was included in the offer of *Ayers*, *i.e.*, 235A. 2R. 11P., and there is no other evidence that Mr. *Gray* knew what was the acreage of *Ayers'* farm. A blunder was made by Mr. *Gray*, for the Plaintiff's offer was not for that for which *Gray* thought it was, and under this mistake he accepted the Plaintiff's offer. Then arises the question, What is the effect of that mistake? It is contended on behalf of the Defendant that the effect is to enable him absolutely to refuse the contract, except upon the terms of receiving a rent of £500 for 214A. 1R. 13P. The Plaintiff, on the other hand, contends that he is entitled to require the Defendant to grant him a lease of the 214A. 1R. 13P. at a reduced rent by way of compensation for the deficiency of the acreage. In my opinion the Plaintiff's contention is well founded. It appears to me that the mistake is not one which goes to the *corpus* with which the contract deals; it is not a mistake as to the essential terms of the contract. A mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms to be made the subject of compensation. If the incapacity of the Defendant to perform this contract had arisen from some other cause, such as the act of God, that would clearly have been a proper subject of compensation, and I think it is not the less so because the incapacity arose from a blunder of the Defendant's agent. I hold, therefore, that the Defendant must grant the Plaintiff a lease of the 214A. 1R. 13P., and that the rent of £500 must be reduced in the proportion which that quantity bears to 235A. 2R. 11P., because I come to the conclusion that *Gray* accepted the Plaintiff's tender as being an offer for the quantity for which *Ayers* had tendered. The Defendant must pay the costs of the action.

Solicitor for Plaintiff: *Robert Helsham.*

Solicitors for Defendant: *Sharp & Ullithorne*, agents for *Greville & Edwards, Towcester.*

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Nov. 17; Dec. 8, 10.

[1877 H. 92.]

Specific Performance—Conditional Contract—"Subject to the approval of the Title by the Purchaser's Solicitor."

A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor":—

Held, that, in the absence of *mala fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title.

Statement.

THIS was an action for the specific performance of an agreement by the Defendant to purchase the lease of a house from the Plaintiff.

The alleged contract was contained in the following written memorandum, which was signed by the Plaintiff, and delivered by him to the Defendant:—

"February 12, 1877.

"Received of Mr. *S. Buck*" (the Defendant) "this day the sum of £20 in respect of *Arkley Copse*, near *Barnet*, as a deposit on the purchase of the lease, with possession upon completion, for the sum of £680, and subject to the transfer of the mortgage now upon the property, and also the approval of the title by Mr. *Buck's* solicitor.

"(Signed) *W. C. Hudson.*

"Purchase-money	£1600
"Less amount of mortgage at this date	920
	£680"

Arkley Copse consisted of a villa and garden attached thereto. On the 20th of February, 1877, an abstract of the Plaintiff's title was sent by his solicitors to Mr. *Jennings*, the Defendant's solicitor. By this abstract it appeared that the villa called *Arkley Copse* was, together with an adjoining house and garden, demised by an indenture dated the 20th of October, 1853, by *Richard Durant* to *G. W. Miller* for a term of ninety-nine years from the 29th of September, 1852, at the yearly rent of £10. The lease contained a covenant by the lessee not to erect any other buildings on the land without the license of *Durant*, his heirs or assigns, first

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obtained for that purpose, and subject expressly to such reserved annual rent or premium which he or they should place thereon.

By an indenture dated the 2nd of August, 1875, the premises comprised in the lease of the 20th of October, 1853, became vested in the Plaintiff for the then unexpired residue of the ninety-nine years' term. By an indenture dated the 3rd of August, 1875, the Plaintiff assigned the adjoining villa and garden to *A. S. Josling* for the then residue of the ninety-nine years' term, subject to the payment of a yearly rent of £5 (a moiety of the yearly rent of £10 reserved by the original lease) and to the covenants contained in that lease. No apportionment was then made of the £10 rent or of the covenants contained in the original lease, but a power of distress was given to *Josling* over the adjoining premises (*Arkley Copse*) in case the £5 rent remaining payable by the Plaintiff in respect thereof should be in arrear for twenty-one days.

On the 4th of August, 1877, the Plaintiff mortgaged *Arkley Copse* to a building society for £1100, which was to be repaid in monthly instalments.

On the 22nd of February, 1877, the Defendant's solicitor wrote to the Plaintiff's solicitors as follows:—

"I beg to acknowledge receipt of abstract of title and to say that I do not approve of title to the house contracted to be sold to my client as thereby deduced.

"The lease contains other property than that sold, and there has been no legal apportionment with the lessor of rent or covenants, &c. The lease also contains restrictive covenants as to building, with power to lessor to increase the rent.

"By the terms of the mortgage as abstracted, it appears that the £180 paid by vendor is not for principal only, but that a very trifling portion thereof (if any) would be put to principal account.

"Under these circumstances, therefore, my client instructs me to proceed no further in the matter, but to ask that the deposit money paid by him may be returned."

Further correspondence took place between the solicitors, and on the 1st of March, 1877, the Defendant's solicitor wrote to the Plaintiff's solicitors as follows:—

"I have now seen my client and am instructed to say that the

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facts relating to the mortgage and the material facts relating to the title were not fully explained to him, nor were then entered into and thoroughly understood by him . . . As to the title, it is particularly expressed as subject to Mr. *Buck's* solicitor's approval. I have to repeat that I do not approve of the title as deduced by abstract delivered, the covenant as to future erections being of a most objectionable character where more than one property is held under the same lease. And further, the rent and covenants not being apportioned, the purchaser cannot be advised to accept the title with such liabilities. In the present defective state of the title, I submit that it is useless for me to proceed to incur additional expenses. My client agreed to purchase the property for a residence only, and unless my objections are satisfactorily removed within fourteen days from this date, my client will be compelled to seek other premises, and will consider that the vendor is unable or unwilling to furnish a good and satisfactory title, and will take proceedings to recover his deposit and the expenses to which he has been put."

Statement.

The Plaintiff did not within the fourteen days obtain any binding agreement on the part of the ground landlord for the apportionment of the rent and covenants of the original lease. On the 6th of March, 1877, the writ in the action was issued.

The Defendant did not, in his statement of defence, plead the *Statute of Frauds*. Some time after the issue of the writ the Plaintiff obtained the consent in writing of the ground landlord to an apportionment of the rent and covenants of the original lease.

This was the trial of the action.

Cookson, Q.C., and *Shebbeare*, for the Plaintiff:—

Argument.

We have satisfactorily answered the objection as to the mortgage.

As to the objection in regard to the covenant, the purchaser of a lease takes it subject to all the covenants contained in it. He ought to inquire what they are: *Hall* v. *Smith* (1); *Grosvenor* v. *Green* (2); *Martin* v. *Cotter* (3); *Walter* v. *Maunde* (4); *Cosser* v.

(1) 14 Ves. 426.
(2) 28 L. J. (Ch.) 173.
(3) 3 J. & Lat. 496, 506.
(4) 1 Jac. & W. 181.

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Collinge (1); *Smith* v. *Capron* (2); *Sugden's* Vendors and Purchasers (3). The law in this respect has not been altered by the recent case of *Hyde* v. *Warden* (4). The covenant is not an unusual one. At any rate, we are now able to procure an apportionment of the rent and covenants. The fact that the contract is made subject to the approval of the Defendant's solicitor means nothing more than the law would imply in the absence of any such stipulation. It only means that a good title must be shewn by the vendor. *Williams* v. *Edwards* (5), which may be relied on by the Defendant, was quite a different case.

Fischer, Q.C., and *Hemings*, for the Defendant:—

The approval of the title by the Defendant's solicitor is an essential term of the contract. That approval has never been given. The object was to prevent the necessity of any application to the Court, and the solicitor has acted *bonâ fide*. This is a sufficient answer to the action: *Williams* v. *Edwards*.

[FRY, J.:—There the agreement was that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by the time appointed for the completion of the purchase.]

The effect of our stipulation is the same.

[They were stopped by the Court.]

Cookson, in reply:—

Williams v. *Edwards* is distinguishable. The objections made by the Defendant's solicitor are unreasonable, and therefore the condition does not apply: *Sugden's* Vendors and Purchasers (6). The solicitor had no power to make time of the essence of the contract.

Judgment.

FRY, J.:—

The Plaintiff seeks the specific performance of a contract which is expressed in a memorandum dated the 12th of February, 1877,

(1) 3 My. & K. 283.
(2) 7 Hare, 185.
(3) 14th Ed. p. 7.
(4) 3 Ex. D. 72.
(5) 2 Sim. 78.
(6) 14th Ed. p. 342.

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and signed by the Plaintiff. [His Lordship read the memorandum, and referred to Mr. *Jennings'* letter of the 22nd of February, and continued:—]

This gives rise to the inquiry, what is the true meaning of the words "subject to the approval of Mr. *Buck's* solicitor." It is contended on behalf of the Plaintiff that they are merely the expression of that which the law would imply if they had not been inserted, and that therefore they operate nothing. What, then, does the law imply in the case of a contract for the sale of leasehold property? It implies that the vendor shall make a good title to the property. Is that the same thing as a stipulation that the contract shall be subject to the approval of the title by the purchaser's solicitor? It appears to me that it is not. Observe the difference between the results in the two cases. In the one case the approval or disapproval of the person specified is, in my opinion, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shewn. In the other case the goodness of the title may be a matter for the decision of the Court. It might come first before this Court, then before the Court of Appeal, and lastly before the House of Lords. In all these Courts the question of the title might be discussed, and possibly with varying results. Moreover, the title might be the subject of reference to the Chief Clerk in Chambers, and upon his findings interlocutory applications might be made to the Court, and in this way the final decision of the matter might be indefinitely protracted. It appears to me that it is not unreasonable to suppose that the purchaser should desire to preclude the possibility of such a protracted litigation, and that he should intend to stipulate that the opinion of a particular person, his own solicitor, should be conclusive as to the sufficiency of the title deduced, and that, in the absence of compliance with that condition, the contract should not be capable of being enforced. It is not necessary to decide that the absence of approval by the purchaser's solicitor would be conclusive, if the purchaser himself had acted unreasonably, as, for instance, if he had declined to appoint any solicitor, or if the solicitor whom he appointed had insisted upon utterly unreasonable objections to the title. Possibly in such cases the purchaser would not be able to enforce the condition. It is not suggested

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in the present case that the conduct of the purchaser himself has been in any respect unreasonable, and I have therefore to consider whether the objections taken to the title by his solicitor were unreasonable. [His Lordship referred to the objections raised in Mr. *Jennings'* letter of the 22nd of February, and to the facts bearing upon them, and continued:—]

It is admitted that no valid apportionment of the ground rent of £10 was made on the occasion of the assignment of the other house by the Plaintiff in 1875, and that the whole rent of £10 could be raised out of the property purchased by the Defendant, and it is admitted that no apportionment was made of the covenants contained in the original lease, one of those covenants being a covenant not to build upon any part of the land comprised in that lease without the license of the lessor, for which license he was to be at liberty to require an additional rent to be paid. It is not contended that the fact that the two houses were comprised in the one lease at one rent, and subject to such covenants, was not a serious objection to the title, and a fatal objection if it could not be removed. But it said that the objection was capable of being removed, and that the purchaser was bound to wait until the defect had been cured. If it had been shewn that there was, before the expiration of the fourteen days fixed by Mr. *Jennings'* letter of the 1st of March, any binding contract on the part of the landlord, any written consent by him to an apportionment of the rent and covenants, the case would have been quite different. It is true that the purchaser's solicitor had been told that an apportionment of the rent and covenants could be obtained, but no binding agreement was entered into by the landlord until May. The objection was taken on the 22nd of February; it was not then met by any evidence of the landlord's willingness to consent to an apportionment. On the 1st of March the purchaser's solicitor gave the vendor fourteen days to remove the objection, but no steps were taken to do so within that time. I am of opinion, therefore, that on the 22nd of February there was a perfectly reasonable ground of objection to the title, and this objection was not removed until after the action had been brought. I hold that there was nothing unreasonable in the conduct of the Defendant's solicitor, and that as the condition contained in the

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contract has not been fulfilled, the Plaintiff's case fails. The Defendant is entitled to judgment with costs. The deposit must be repaid with interest.

Solicitors for Plaintiff: *R. Miller & Wiggins.*
Solicitor for Defendant: *G. J. Jennings.*

AUSTIN *v.* AMHURST.

[1873 F. 75.]

Prescription—Custom—Profit à prendre—Occupiers—Copyholders—Manor.

The occupiers of lands under the copyholders of a manor claimed, and by a by-law were declared entitled to, certain rights of common over the lands of the manor. Part of the lands had been sold to a railway company, and the occupiers claimed to share in the purchase-money:—

Held, that the claim could not be maintained. It could only be made by custom, by grant, or by prescription. There could be no such custom giving a *profit à prendre in alieno solo*; there was no grant; and there could be no right by prescription, inasmuch as the claim would be against the owner of the land in respect of which the claim was made.

Statement.

THIS was an action on behalf of the "occupiers" of lands in the Manor of *Lord's Hold* in *Hackney*, claiming to share in certain sums of money paid into Court on purchases by a railway company and by other companies, of lands within the manor. Under an order made in the suit of *Fox* v. *Amhurst* (1) the money was divisible amongst the copyhold and freehold tenants of the manor as therein mentioned. The present Plaintiffs alleged that the "occupiers" had not been represented in that suit, and claimed as against the copyholders and freeholders to share in the money. There was no statement of the meaning of the word "occupiers," but the occupiers appeared to be the tenants under the copyholders and freeholders. The facts of the case are sufficiently stated in the judgment of his Lordship.

Argument.

Cookson, Q.C., and *Atherley Jones*, for the Plaintiffs:—

The occupiers have by prescription rights over the lands of the manor, and the by-law merely recognises these rights. In *Gate-*

(1) Law Rep. 20 Eq. 403.

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ward's Case (1) there was nothing but custom; *Cowlam* v. *Slack* (2) was a similar case: *Grimstead* v. *Marlowe* (3). The claim is to common appurtenant, of which the Court will presume a grant: *Beau* v. *Bloom* (4); *Sacheverill* v. *Porter* (5); *Warrick* v. *Queen's College, Oxford* (6).

[FRY, J., referred to *Constable* v. *Nicholson* (7).]

Baylis v. *Tyssen-Amhurst* (8) was not a similar case.

Kekewich, Q.C., *Franklen*, *Elton*, and *Tyssen*, for the Defendants, were not called upon.

Judgment.

FRY, J.:—

The Plaintiffs come here in order to prove a certain right of common; but if it is apparent to my mind that the right of common alleged by them cannot have a legal existence, of course it would be a waste of time to hear the evidence upon that point. If, however, I am wrong in the view which I take as to the impossibility of such a right of common, the cause can be sent back to me for trial upon the question whether such a right of common is proved to exist.

The Plaintiffs sue "on behalf of themselves and all other the occupiers of freehold and copyhold lands or tenements within the Manor of *Hackney*, called the *Lord's Hold*." The Defendants are of two classes. The first five are trustees of certain funds which have arisen from the taking of part of the lands of the manor by a railway company and by other companies; and the remaining Defendants represent copyhold tenants of the manor, or copyhold tenants whose lands have been enfranchised. The Plaintiffs in effect are claiming against those Defendants but in respect of the same lands; that is to say they are claiming against their landlords to have an independent right of common in respect of the lands of which those copyholders and freeholders are the owners.

Now the exact nature of the right of common claimed it has

(1) 6 Rep. 59 b.
(2) 15 East, 108.
(3) 4 T. R. 717.
(4) 2 W. Bl. 926; 3 Wils. 456.
(5) Cro. Car. 482.
(6) Law Rep. 6 Ch. 716.
(7) 14 C. B. (N.S.) 230.
(8) 6 Ch. D. 500.

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not been very easy to ascertain. The most exact description that I am able to discover or to learn from the opening statement of the counsel for the Plaintiffs is to be found in a by-law of the 28th of April, 1835, passed by the homage, and alleged by the Plaintiffs to be an admission of their title. That by-law is very singular and is to this effect:

"That every copyholder and freeholder of lands and tenements within this manor shall be entitled to common of pasture for one head of cattle for every £10 annual value of his said lands and tenements; provided always that the whole number to any one copyholder or freeholder shall not exceed thirty, and that such copyholder or freeholder shall, on or before the 12th day of August in every year, claim such right; in default of which claim the same shall be transferable to the occupiers of such lands or tenements respectively in rateable proportion in addition to their own rights as occupiers.

"That every occupier of any copyhold or freehold lands or tenement within this manor shall be entitled to common of pasture when his or her rent or annual value is at or under £10 a year to three head of cattle, £15 to six, £20 to nine, £25 to ten, £35 to eighteen, £40 to twenty-one, £45 to twenty-five, £50 to thirty, and one head only for every £5 above £50."

Now that by-law undoubtedly seems to recognise a right of common in the occupier of a copyhold or freehold tenement, independent of and separate from another right of common in the copyholder or freeholder of the same tenement; and what is not the least singular part of the by-law, it transfers the right of the copyholder or freeholder to his occupier, unless before the 12th of August that copyholder or freeholder makes a certain claim.

That being the nature of the right alleged, the first inquiry is in what method is it claimed. It can be claimed only in one of three ways; by custom, by grant, or by prescription. It is not, and could not be, claimed by custom, because the claim is to a *profit à prendre in alieno solo;* and from *Gateward's Case* (1) down to the present time it has been established law that such a *profit à prendre* cannot be claimed by custom. Grant is out of the

(1) 6 Rep. 59 b.

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FRY, J. 1877 AUSTIN v. AMHURST. Judgment.

question, because no grant has been or can be produced. It remains, therefore, to inquire whether such a right can be claimed by prescription.

Now prescription, to use the language of *Blackstone's* Commentaries (1), must be "either in a man and his ancestors, or in a man and those whose estate he hath." There is a third mode of prescription, which is apparently, but not really, a third, namely, claiming as a member of a corporation; that is however claiming in the first character, and the prescription there by the member of the body corporate is in right of that body as a person. I will, however, treat these as three modes of prescription, and I will inquire whether the Plaintiffs can succeed on any one of them. In the first place they do not prescribe in themselves and their ancestors, because *non constat* that their ancestors were occupiers of the manor. In the second place they do not prescribe as members of a corporation, because there is no Crown grant from which the existence of a corporation can be inferred in order to uphold the grant. It is not suggested, and could not be suggested, that without a Crown grant the occupiers of land in a particular district could be constituted a corporation; therefore claiming as a member of a corporation is also out of the question. The third mode of prescribing is known as prescribing in respect of a *que estate*, that is to say, prescribing in respect of an estate which is possessed by the person claiming the benefit of the prescription. Now it is difficult to see what *que estate* there can be in a mere occupier, for if there be any *que estate* at all, it is the estate of the landlord under whom the occupier claims. But it is against those landlords that the occupiers here are claiming, and therefore, if I were to admit this prescription, I should allow the right to be claimed by a man in respect of the estate of another, and against that other; which seems to me impossible.

It appears to me to follow, from the observations I have made, that no such claim can be made by prescription; that it cannot be made by custom or by grant; and that there is no possible mode in which the custom or the right set up could be valid in law if it were proved in fact to have been followed or allowed.

(1) 23rd Ed. vol. ii. p. 264.

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That being so, and it being admitted that the whole of the Plaintiffs' claim rests upon that allegation of right, I must dismiss the action with costs.

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AUSTIN
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Solicitor for Plaintiffs: *E. Kimber.*
Solicitors for Defendants: *Cheston & Sons.*

BENTINCK *v.* DUKE OF PORTLAND.

FRY, J.
1877
Dec. 19.

[1876 B. 511.]

Will—Perpetuity—Period of ascertaining Class—Increase of Shares.

Where there is a time fixed at which a fund is to be divided into separate shares, each share stands separate, and the gift of any share will take effect if the disposition of that particular share does not violate the rule against perpetuities, and will not be made void by the invalid gift of a portion of another share to the donee of the first-mentioned share. But where there is a gift to a class and the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is void.

A testatrix made a bequest in trust for such of her four nephews and nieces as should be living at the expiration of twelve months after the death of their mother, and the issue then living who should attain the age of twenty-one years, of any of the nephews and nieces who should have died before the expiration of the twelve months:—

Held, on the construction of the will, that there was no period of distribution fixed except by the gift to the class; and *held*, that as the members of the class might not be ascertained until the expiration of more than twenty-one years from the death of the mother, the whole bequest failed.

Statement.

LADY MARY BENTINCK, widow, by her will, dated the 25th day of March, 1843, after giving certain specific and pecuniary legacies, gave and bequeathed unto the Duke of *Portland* (then Lord *Titchfield*), and Lord *Gosford* and *Charles Eaton Ellis*, the trustees and executors of her said will, 240 shares in the *Edinburgh and Glasgow Railway Company*, upon trust that the trustees or trustee for the time being of that her will should invest the dividends, interest, and income of the same shares, and the dividends, interest, and income of all such investments, so that the same might accumulate by way of compound interest in their or his own names or name in or upon some of the Government or

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PORTLAND.
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Parliamentary stocks or funds of *Great Britain*, or real or long leasehold securities in *England* or *Wales*, until the death of Lady *Charles Bentinck*, the widow of Lord *Charles Bentinck*, and vary and transpose the same investments from time to time unto or for other stocks, funds, and securities of a like nature as they or he in their or his discretion might think proper, and the same accumulations to go with and follow the shares from the dividends, interest, and income whereof such accumulations might have arisen. "And immediately after the decease of the said Lady *Charles Bentinck* to stand possessed of the said 240 shares, and all accumulations arising therefrom, upon trust for all and every, or such one or more exclusively of the others or other, of the following nieces and nephews of my late husband, namely, *Annie Hyacinthe Cavendish Bentinck*, *William Charles Cavendish Bentinck*, *Arthur Cavendish Bentinck*, and *Emily Cavendish Bentinck* (the four children of the said Lord *Charles Bentinck* and Lady *Charles*, his wife), who shall be living at the time of the appointment next hereinafter mentioned, and the issue then living of any of the same nieces and nephews (whether the parent or ancestor of such issue shall be then living or dead), in such parts, shares, and proportions, and for such times, with such limitations over or substitutes in favour of any one or more of the same nieces and nephews and issue respectively, and either by way of legacy portion, present or remote interest, or otherwise and to vest, and be payable and paid, transferred and assigned, at such time or times, age or ages, day or days, and upon such contingency, and under and subject to such directions and regulations for maintenance, education, and advancement, and such conditions and restrictions as the person who shall then be the Duke of *Portland*, after the decease of the said Lady *Charles Bentinck*, and within twelve calendar months next after her decease in case the said Lady *Charles Bentinck* shall survive me, but in case she shall die in my lifetime, then within twelve calendar months next after my decease, by any deed or deeds, instrument or instruments in writing to be sealed and delivered by him in the presence of two credible witnesses, and to be attested by the same witnesses, shall direct, limit or appoint, and in default of such direction, limitation, or appointment for the space of twelve calendar months next after the

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decease of the said Lady *Charles Bentinck*, or my decease, as the case may be, and as to such part or parts of the said trust premises to which such direction, limitation, or appointment, if made, shall not extend, then upon trust for all and every of them the said four children of the said Lady *Charles Bentinck* who shall be living at the expiration of twelve calendar months next after the decease of Lady *Charles Bentinck* or myself, whichever of us shall be the survivor, as tenants in common, if more than one, and also the issue then living, and who shall attain the age of twenty-one years or marry, of any of the said four children who shall have died before the expiration of such twelve calendar months, whether in my lifetime or after my decease, such issue through all the degrees to take *per stirpes* as tenants in common, if more than one, the share or respective shares which his, her, or their parent, or respective parents, would have been entitled to if living, for the absolute use or benefit of the said children or their issue respectively."

The testatrix then bequeathed the residue of her estate to her executors, upon trust as to three-sevenths thereof for three persons therein named, and as to the remaining four-sevenths upon the same trusts as were thereinbefore declared concerning the said 240 railway shares.

The testatrix died on the 1st of May, 1843, leaving Lady *Charles Bentinck* and her four children surviving.

The 240 railway shares and four-sevenths of the residuary estate were set apart and held by the executors, and the income had been accumulated. The shares and accumulations were still held by the Duke of *Portland*, the survivor of the executors.

Emily Cavendish Bentinck, one of the four legatees, married the Rev. *H. Hopwood*, and died in 1850, leaving issue one child; and *W. C. C. Bentinck*, another legatee, died in 1865, leaving issue three children.

Lady *Charles Bentinck* died on the 19th of March, 1875.

The Duke of *Portland* did not exercise the power of appointment given to him by the will.

The question was raised whether the bequests of the 240 shares and accumulations, and the devise and bequest of the four-sevenths of the residue, were not void under the rule against perpetuities,

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Argument.

and did not lapse for the benefit of the heir and next of kin of the testatrix; and this action was brought to have the rights and interests of all parties ascertained and determined by the Court.

The action now came on for trial.

Sir *H. Giffard*, S.G., and *Romer*, for the Plaintiffs, the children of *W. C. C. Bentinck* and of Mrs. *Hopwood*:—

It has been contended that this bequest is void, inasmuch as one of the children of Lady *Charles Bentinck* might have a child born after the death of Lady *Charles Bentinck*, and might die within twelve months after the death of Lady *Charles Bentinck*; in which case the interests of all parties would not be ascertained until more than twenty-one years after the death. But this is not so; the shares are vested in these children subject to a bad divesting clause, and the gift is therefore not invalid. *Theobald* on Wills (1), *Griffith* v. *Pownall* (2), *Cattlin* v. *Brown* (3), and *Knapping* v. *Tomlinson* (4), are strongly in favour of the validity. So in *Muskett* v. *Eaton* (5); *Festing* v. *Allen* (6); *Slark* v. *Dakyns* (7). In *Smith* v. *Smith* (8) and *Hale* v. *Hale* (9) the shares were not to be ascertained until too late; here they were to vest within the time, and were not all mixed together. There are children who can take, and the existence of others ought not to affect them. The gift is good if the period of division is fixed within the time: *Wilson* v. *Wilson* (10). Here the shares of each child were separate, and each share is as well ascertained as it ever will be, though it may be afterwards subject to increase. Some of the gifts to several legatees may be good and some bad: *James* v. *Lord Wynford* (11).

Davey, Q.C., and *Dobbs*, for Lady *Millicent Barber*, representing some of the next of kin of the testatrix:—

The shares cannot be ascertained until the period of distribution, which is beyond the time allowed by law. It is a fallacy to say that

(1) Pages 276, 298.
(2) 13 Sim. 393.
(3) 11 Hare, 372.
(4) 34 L. J. (Ch.) 3; 10 Jur. (N.S.) 626.
(5) 1 Ch. D. 435.
(6) 12 M. & W. 279.
(7) Law Rep. 10 Ch. 35.
(8) Ibid. 5 Ch. 342.
(9) 3 Ch. D. 643.
(10) 28 L. J. (Ch.) 95; 4 Jur. (N.S.) 1076.
(11) 1 Sm. & Giff. 40.

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the shares were ascertainable at the death of the tenant for life, and are merely subject to an increase. If all the children had been living, no doubt the shares would have been then ascertained, and the rule against such a gift is very hard, but it is the rule, and when any member of a class may possibly not be ascertainable within the proper time, the gift is void *in toto*: *Leake* v. *Robinson* (1). There is a good definition of a class in *Jarman* on Wills (2). The soundness of the decision in *Porter* v. *Fox* (3) has been doubted. *Seaman* v. *Wood* (4) and *Cattlin* v. *Brown* (5) put it beyond a doubt.

V. Hawkins, for Lord *Gosford*, representing the heir-at-law and some of the next of kin of the testatrix:—

We must look at the state of things at the death of the testatrix. The gift was then to persons then living, and also to others who might be born within twelve months after the death of Lady *Charles Bentinck*, and who would therefore not take a share until more than twenty-one years after death; and such a gift is bad.

Joshua Williams, Q.C., *North*, Q.C., *Kekewich*, Q.C., *Cracknall*, *Coltman*, *Davenport*, *Morris*, and *Cherry*, for other parties:—

Romer, in reply:—

There is an ascertained class of children and there are gifts to the children of such as shall die and leave issue, but they do not make a class. Where a gift, which is merely in substitution for another gift is void, that does not make the original gift void. At any time before the end of the twelve months, any one of the children might have come and claimed his then apparent share, which must have been paid to him though he might afterwards become entitled to more. The issue do not take directly, but only in substitution; the substituted gift may be void and the direct gifts to the children may remain good.

FRY, J.:— Judgment.

The question I have now to determine is with regard to the validity of certain gifts contained in the will of Lady *Mary*

(1) 2 Mer. 363, 382.
(2) 2nd Ed. vol. i. p. 216.
(3) 6 Sim. 485.
(4) 22 Beav. 591.
(5) 11 Hare, 372.

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FRY, J. 1877 BENTINCK v. DUKE OF PORTLAND. Judgment.

Bentinck. [His Lordship then described and read the terms of the gift.]

I will state in the first place what I conceive to be the law applicable to the question. Where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities, there, as I conceive, each share stands separate from the others, and will take effect or not according as the dispositions of that share do or do not violate the rule against perpetuities; and I conceive it to follow that the valid gift of one share will not be made void by the invalid gift of another share, or of a portion of another share, to the donee of that first share. Further, I conceive it to be clear from the authorities that the case is quite different where the gift is what is called a class gift; and I conceive that it is a class gift where the total and ultimate amount of the share to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they are to take, are finally ascertained.

If those be the principles of law which regulate this question, the first inquiry which arises is this: Is there or is there not here a time fixed for distribution which is within the rule against perpetuities? It is said that there is. It is said that the time fixed is at the expiration of twelve calendar months from the death of Lady *Charles Bentinck* or the testatrix, whichever should be the longer liver. Now it will be observed that there is no express direction to divide at that time, and that it is only by construction or inference that that time can be arrived at as the time for final division. I must therefore consider what are the words of gift, and of course the definition of the class will tell me when the division among the class will take place, because if there is no direction to divide except in the gift to the class the period of division must be the period of the ascertainment of the class. The class then appears to be, first, such of the four children of Lady *Charles Bentinck* as shall be living at the expiration of the twelve calendar months, "and also the issue then living and who shall attain the age of twenty-one years or marry of any of the said children who shall have died before the expiration of such twelve calendar months." It is said, however, that this is not

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the class, and that the true class consists of two categories: first, of the children of Lady *Charles Bentinck* then living, and, secondly, of the *stirpes* of such of the children as were then dead leaving issue living at that period.

I am of opinion that that is not the true class, and for this reason: if any one of those *stirpes* fail, it is evident that the gift among the children of that *stirps* would fail, consequently that there is not a final distribution amongst the persons or *stirpes* as has been suggested.

It is then said that although the words "who shall attain the age of twenty-one years" appear to be expressive of a condition or qualification or predicate of the persons who are to take, yet that is not the true construction, and that they ought to be held to import a proviso by way of defeasance—a divesting clause and not a qualification or predicate of the takers. That is a pure question of construction, and upon it I come to the conclusion that the attaining of the age of twenty-one or marrying at some time is a necessary condition of the issue of a deceased child taking. I hold, therefore, that the class which is to take consists of such of the four children of Lady *Charles Bentinck* as should happen to be alive at the expiration of twelve calendar months from her death or from the death of the testatrix, and such of the issue then living who should attain the age of twenty-one or marry, of any of the said four children who were then dead.

The inquiry then remains, if it can be called an inquiry, whether some of that class are not to be ascertained at a period beyond that which is prescribed by the rule against perpetuities. It is clear that they are, because a grandchild of Lady *Charles Bentinck*, being a member of the class, may attain the age of twenty-one at a period beyond the lifetime of the testatrix, or of Lady *Charles Bentinck*, or twenty-one years afterwards. I am therefore bound to hold that there is no independent period of distribution here fixed, but that the period is to be ascertained from the class; that the class includes persons who may not satisfy the requirements of the rule against perpetuities, and consequently that the distribution cannot take effect, or may not take effect, within a period not obnoxious to the rule, and that the gift is void,

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FRY, J.
1877
BENTINCK v. DUKE OF PORTLAND.
Judgment.

It remains to make one or two observations on the cases. Those cases fall, I think, under two divisions. There are the cases of *Seaman* v. *Wood* (1), *Smith* v. *Smith* (2), and *Hale* v. *Hale* (3), which appear to me exceedingly difficult, if not impossible, to distinguish from the present case by any satisfactory explanation. I think, in effect, that I am bound by those cases to decide as I have decided. There have been cited on the other side three cases very well worthy of attention in construing this will—*Griffith* v. *Pownall* (4), *Cattlin* v. *Brown* (5), and *Knapping* v. *Tomlinson* (6). It will be observed that in all those cases the shares taken by the persons ascertained within the period were incapable of increment by anything that might happen to the other shares. That appears to me the solid ground of distinction between those cases and the present case. In those cases, in effect, the share was finally and absolutely ascertained; it was neither capable of diminution or of enlargement after the period allowed by law. No doubt it is quite true that the distinction on which I am relying is a fine distinction—between a gift of separate shares together with an interest in other shares which interest might be void for violating the rule against perpetuities, on the one hand, and, on the other hand, of a share whose smallest amount may be ascertained within the lawful period, but whose maximum amount can only be ascertained beyond the period—nevertheless it appears to me to be a distinction which the cases compel me to draw. I hold that this case belongs to the latter and not to the former class of gifts, and therefore that the gifts to the four children of Lady *Charles Bentinck* entirely fail.

Declare that the bequest of the railway shares is void and that they fell into the residue. Declare that as to four-sevenths of the residue the devise and bequest are void, and that the same were undisposed of by the will.

Solicitors for Plaintiffs: *Farrer, Ouvry, & Co.*

Solicitors for Defendants: *Walters, Young, & Co.; White, Broughton, & White; Hollams, Son, & Coward; Baileys, Shaw, & Gillett.*

(1) 22 Beav. 591.
(2) Law Rep. 5 Ch. 342.
(3) 3 Ch. D. 643.
(4) 13 Sim. 393.
(5) 11 Hare, 372.
(6) 34 L.J. (Ch.) 3; 10 Jur. (N.S.) 626.

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McANDREW *v.* BARKER.

C. A.
1877
Dec. 4.
1878
Jan. 28;
Feb. 1.

Practice—Time for appealing—Order on Interpleader Issue—Rules of Court, 1875, Order LVIII., r. 15.

Two actions having been brought relating to a cargo, an interpleader issue was directed to try the question to whom it belonged. It was tried by the Master of the Rolls, who made an order finding in favour of the Defendants, and declaring them to be entitled to the cargo. Subsequently an order was made in the actions directing the proceeds of the cargo, which were in Court, to be paid to the Defendants:—

Held, that the former order was an interlocutory order, from which an appeal could not be brought after twenty-one days.

Leave to appeal notwithstanding the lapse of time, refused; the Respondents not having done anything to raise an equity against them.

Statement.

THIS was an appeal against two orders of the Master of the Rolls, dated respectively the 1st of May and the 6th of July, 1877. The only point decided was on one of two preliminary objections to the competency of the appeal as regards the earlier of the two orders.

The question arose as follows:—In the year 1876, disputes having arisen as to the title to certain pigs of lead *ex* the steamship *Lisbon*, which had been landed at the *St. Katharine Docks*, such disputes resulted in the two actions of the *London and St. Katharine Docks Company* v. *Locke, Lancaster, & Co.* [1876 L. 138], and *Barker & Co.* v. *London and St. Katharine Docks Company* [1876 B. 244]. Messrs. *McAndrew*, the present Appellants, claimed to be entitled to the lead, and the Master of the Rolls, upon the application of the Defendants in the actions, made an order, dated the 2nd of August, 1876, by which he directed the whole of the pigs of lead to be sold and the proceeds to be brought into Court, and further directed the question as to the ownership of the lead to be tried in an issue between the Appellants as Plaintiffs, and *George Barker*, trading as *George Barker & Co.*, as Defendants. The lead was accordingly sold, and realized the sum of £1057 14*s.* 7*d.*, which sum was paid into Court to the credit of the two actions.

The issue was settled, and on the 30th of April, 1877, came on to be tried before the Master of the Rolls, and on the 1st of May,

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C. A. 1877

McANDREW v. BARKER.

Statement.

1877, the first of the two orders appealed from was made. This order was as follows:—

"The interpleader issue directed to be tried by the order dated the 2nd of August, 1876, made in the two first above-mentioned causes, having been tried on the 30th of April, 1877, and this day before this Court, in the presence of counsel for the Plaintiffs and the Defendants in the issue respectively, upon hearing the interpleader issue read and upon hearing the evidence of *George Rendell*, taken upon his examination at the trial, and what was alleged by the counsel on both sides, This Court finds the issue in favour of the Defendants, and upon motion for judgment this day made unto this Court by counsel for the Plaintiffs, this Court doth declare that, subject to the payment to the Plaintiffs as the agents of *José de Cuenca* of the sum of £37 17*s.* 6*d.*, the Defendants are entitled to the 936 pigs of lead and the proceeds thereof in the said issue mentioned, and doth order and adjudge that the Plaintiffs [naming them] do pay to the Defendants, *G. Barker & Co.*, their costs of the said issues, such costs to be taxed by the Taxing Master."

On the 6th of July the matter of the two actions which had been stayed pending the trial of the interpleader issue was brought before the Master of the Rolls at Chambers, all the parties interested, including the Appellants, being represented, and an order was made to the effect that Messrs. *McAndrew* should pay to the *London and St. Katharine Docks Company* and to *George Barker* their respective costs of the two actions, and of the said order of the 2nd of August, 1876, and of the present order. 2. That *George Barker* should pay to *Locke, Lancaster, & Co.* their costs of the same two orders, and of the action in which they were Defendants. 3. That out of the money deposited in Court, the said sum of £37 17*s.* 6*d.* should be paid to Messrs. *McAndrew.* 4. That a sum of £35 3*s.* 8*d.* should be paid to *Locke, Lancaster, & Co.* for freight, lighterage, and dock charges in respect of the lead; and, lastly, that the residue of the money deposited should be paid to *George Barker.*

On the 4th of August, 1877, Messrs. *McAndrew* gave notice of appeal against both orders, the main object of the appeal being that of impugning the finding upon the interpleader issue.

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1877. Dec. 4. *Davey*, Q.C., and *Warmington*, for the Respondents, took two preliminary objections:— C. A. 1877 McANDREW v. BARKER. Argument.

First, an appeal will not lie from the Judge's finding. The proper course is an application for a new trial: *Fernie* v. *Young* (1). Secondly, the first order is an interlocutory order, and the appeal is out of time. The order has nothing of a final character about it. There is no judgment in the action; it is a mere preliminary step, although it decides in substance the whole merits: *Cummins* v. *Herron* (2).

Roxburgh, Q.C., *Everitt*, and *Henderson*, for the Appellant:—

When a Judge decides a mixed question of fact and law against a party, the course is to appeal, not to move for a new trial: *Sugden* v. *Lord St. Leonards* (3). This is an appeal from a decision of law on the facts found, not from the finding of the facts. The order, according to 1 & 2 Will. 4, c. 58, s. 1, is to be treated as being a final order.

Warmington, in reply.

1878. Jan 25. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) was now delivered by Judgment.

THESIGER, L.J., who, after stating the facts as above, continued:—

The Respondents object to the competency of the appeal as regards the earlier order, on the grounds, first, that Messrs. *McAndrew*, if they wished to impugn the finding of the Master of the Rolls upon the interpleader issue, should have applied in the first instance to him for a new trial, and that, not having done so, this Court is precluded from going into the facts upon which the finding was based. Secondly, that the order of the 1st of May, 1877, is an interlocutory one, the appeal against which cannot, except by special leave of this Court, be brought after the expiration of twenty-one days: Order LVIII., r. 15.

We have come to the conclusion that the latter objection is a

(1) Law Rep. 1 H. L. 63. (2) 4 Ch. D. 787.
(3) 1 P. D. 154, 209, 210.

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C. A. 1878 McANDREW v. BARKER. Judgment.

well-founded one. Rule 2 of Order I. of the Rules of the Supreme Court provides with respect to interpleader as follows: "With respect to interpleader the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Will. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the Divisions of the High Court of Justice, and the application by a Defendant shall be made at any time after being served with a writ of summons and before delivering a defence." Under the 1st section of 1 & 2 Will. 4, c. 58, the process of interpleader may be carried out either by making the claimant Defendant in the action in which the application for an interpleader order is made, or in some other action, or by the more common process of a feigned issue. If the last mode is adopted the interpleader issue becomes a process ancillary to the original action, which is still kept alive for the purpose of enabling the Judge seised of the matter, after judgment has been given upon the interpleader issue to finally adjust the rights of all parties, and to settle all outstanding questions of costs.

In the present case the interpleader proceedings took the form last referred to, and although it is true that interpleader issues partake in some measure of the character of actions, and that the findings upon them do substantially determine the questions between the parties to such issues, yet still they are not, strictly speaking, actions, but are more analogous to inquiries directed in the course of actions; and while it has been decided in this Court that the fact of a decision upon such inquiries substantially determining the questions between the parties to them is not in itself sufficient to constitute the order embodying such decision a final one: *Cummins* v. *Herron* (1), it is to be observed in the present case that it was only by the final order made in the actions out of which the interpleader issue sprang, that the directions necessary to terminate all the questions, even between the parties to the issue, were finally given. The determination upon the issue was a condition precedent to the final determination of the actions, and that fact demonstrates the inconvenience and delay which would result from its being held that the order determining the issue is a final order, entitling the unsuccessful party to it to

(1) 4 Ch. D. 787.

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delay any appeal for a year, and thus staying the hands of the Court of first instance as regards the original actions for the whole of such period, or putting the parties to the expense of a final order in the actions, which would require to be set aside if the order upon the interpleader issue turned out to be wrong.

Judgment.

We are of opinion, for the reasons given, that the order of the 1st of May, 1877, was an interlocutory order, and not a final one, and that, consequently, the notice of appeal was given too late, and it becomes, therefore, unnecessary to consider the other objection taken by the Respondents.

Feb. 27. The Appellants applied for leave to appeal, notwithstanding the expiration of the time.

Argument.

Roxburgh, Q.C., and *Everitt*, for the application:—

We cannot allege any conduct on the part of the Respondents which raises an equity against them; but we submit that time ought to be given, on the ground that this was the first case on the question whether such an order is not final, and that the question is a difficult one.

Davey, Q.C., and *Warmington, contrà*, were not called upon.

Judgment.

JESSEL, M.R.:—

I am of opinion that there is no ground for the application. This Court has no discretionary power to deprive a litigant of any advantage given him by the General Orders unless there has been on his part some conduct raising an equity against him.

JAMES and BAGGALLAY, L.JJ., concurred.

Solicitors: *Bradford, Riley, & Co.; Lowless & Co.*

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C. A.
1878
Feb. 13.

In re OAKWELL COLLIERIES.

Practice—Costs of abandoned Appeal Motion.

An Appellant's solicitors wrote to the solicitors of the Respondent withdrawing their notice of appeal as irregular. The Respondent, who had delivered briefs to oppose the appeal, applied *ex parte* to discharge the notice of appeal with costs:—

Held, that notice of motion must be given.

Statement.

THIS was an *ex parte* application by the official liquidator of the *Oakwell Collieries* to discharge a notice of appeal.

Bradford, on the 4th of February, 1878, gave notice of appeal from an order made on the 1st. At this time the order had not been passed and entered. On the 11th his solicitors wrote to the solicitors of the official liquidator, saying that they found that they could not set the appeal down until the order had been served, and that they withdrew the notice as irregular without prejudice to their right to appeal from the order when served. The solicitors of the official liquidator replied on the 12th that briefs had been delivered to oppose the appeal, and that they should instruct counsel to apply next day to discharge the motion with costs.

Cozens-Hardy, for the application, asked that the notice might be discharged as abandoned.

Judgment.

THE COURT (*Jessel*, M.R., and *Baggallay* and *Thesiger*, L.JJ.) held that notice of motion must be given.

Solicitors: *Lee & Grahame.*

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MASON *v.* MASON.

[1877 M. 136.]

C. A. 1878 Feb. 16.

In re MASON (A PERSON OF UNSOUND MIND).

Trustee Act, 1850, *s.* 3—*Vesting Order—Trustee of Unsound Mind—Estate Tail —Form of Order.*

Where, by order under the *Trustee Act*, 1850, the estate of a trustee tenant in tail who is of unsound mind is vested in any person the order should only direct the land to be vested in such person for all the estate which the trustee could convey, if sane, and need not refer to the execution of a disentailing deed, or to the *Fines and Recoveries Act*.

Statement

IN this action an order was made by the Master of the Rolls for the sale of certain real estate in which the Defendants *Elizabeth Mason* and *Ellen Mason* had an estate tail, freed and discharged from all estates tail of the Defendants or either of them, and from all remainders and estates to take effect after the determination of such estates tail respectively.

Both of the Defendants were of unsound mind, not so found by inquisition.

The estates having been sold, a petition was presented by the purchaser, in the Chancery Division and in Lunacy, under the *Trustee Act*, praying that the Defendants might be declared trustees for the purchaser of their respective shares, and that their shares might be vested in the Petitioner for all such estates as the said Defendants respectively, if of sound mind, could dispose of therein by a conveyance duly executed by them respectively, and inrolled in accordance with the provisions of the Act of the 3 & 4 Will. 4, c. 74, in bar and extinguishment of the estates tail therein of said Defendants *E. Mason* and *E. A. Mason* respectively, and of all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates tail respectively.

Argument.

Douglass Round, for the Petitioner, said that the only question was as to the form of the order, which was that given in *Seton* on Decrees (1). The 3rd section of the *Trustee Act*, 1850, empowered the Court in such a case as the present to make an order that the

(1) 4th Ed. p. 535.

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C. A. 1878 MASON v. MASON. land be vested in such person or persons in such manner and for such estate as it shall direct, "and the order shall have the same effect as if the trustee had been sane and had duly executed a conveyance or assignment."

In re MASON (A PERSON OF UNSOUND MIND). Judgment. JAMES, L.J., said that it was not necessary to refer in the order to the *Fines and Recoveries Act*, or to the manner in which the assurance would have been made if the Defendants had been of sound mind. The order ought simply to direct that the land should be vested in the Petitioner for such estate as the Defendants, if sane, could convey; and the land would be freed from the estates tail by the operation of the 3rd section of the *Trustee Act*.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Bridges, Sawtell, & Co.*

C. A. 1878 *Feb.* 16.

In re HOBSON'S TRUSTS.

Lands Clauses Act, 1845, *s.* 69—*Payment out of Court—Trustees with Power of Sale—"Party becoming absolutely entitled."*

Where purchase-money for land has been paid into Court under the *Lands Clauses Act*, it may be ordered to be paid out to trustees of a settlement or will with a power of sale, as persons "becoming absolutely entitled" under the 69th section.

Statement. THIS was an appeal from a decision of Mr. *Little*, the Vice-Chancellor of the County Palatine of *Lancaster*.

John Hobson, by his will, dated the 25th of March, 1843, devised certain real estates to two trustees in trust in the events that happened for the children of the testator's daughter, *Elizabeth Hankinson*, who should attain the age of twenty-one years, or who dying under that age should have issue, as tenants in common in fee. The will contained no power of sale for the trustees.

The testator died in April, 1843.

Elizabeth Hankinson died in 1862, having had issue ten children, two of whom died under twenty-one without issue.

Of the remaining eight children, *Martha* married *O. Hall* in

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1862, *Alice* married *R. Edmondson* in 1863, and *Hester* married *J. Kearsley* in 1871. Previously to the marriages of Mrs. *Edmondson* and Mrs. *Kearsley*, settlements were executed by which their shares in the real estate devised by the testator's will were conveyed to trustees for the benefit of themselves and their children; and by a postnuptial settlement made shortly after the marriage of Mrs. *Hall*, her share was conveyed to trustees on similar trusts. Each of the three settlements contained full powers to the trustees to sell the respective shares and give receipts for the purchase-money.

Another daughter, *Frances Hankinson*, attained twenty-one, and died in 1871 unmarried, having by her will devised all her real and personal estate to her two executors upon certain trusts containing powers of sale. Three other children had attained twenty-one and had not assigned their shares, and one was still an infant.

On the 2nd of May, 1876, the Corporation of *Manchester*, acting under the powers of the *Manchester Corporation Waterworks and Improvement Act*, 1875, with which the *Lands Clauses Acts*, 1845, 1860, and 1869, were incorporated, gave notice to the trustees of *Thomas Hobson's* will to treat for the purchase of some of the lands devised by the will. The amount of purchase-money and compensation was referred to arbitration under the compulsory clause of the *Lands Clauses Act*, 1845, and was ultimately fixed at £18,994, which sum was accordingly paid into Court.

A petition was now presented by the trustees of *Hobson's* will, the trustees of the settlements of Mrs. *Hall*, Mrs. *Edmondson*, and Mrs. *Kearsley*, the trustees of *Frances Hankinson's* will, and the adult children who had not assigned their shares, praying, among other things, that the shares of the purchase-money of the married and deceased daughters might be paid to the trustees of their respective settlements and will.

The Vice-Chancellor refused the prayer of the petition so far as it related to the shares of the married daughters (1), and from this decision the Petitioner appealed.

(1) 1877. July 21.

LITTLE, V.C., after stating the facts of the case, continued:—

As respects the shares devised and settled by Mrs. *Hankinson's* adult children I feel a difficulty in complying with the prayer of the petition. There was no dealing in the

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C. A. 1878 *In re* HOBSON'S TRUSTS. Argument.

Glasse, Q.C., and *W. L. Lewis*, for the Appellants:—

The 69th section of the *Lands Clauses Act*, 1845, enables the Court to pay out the purchase-money to "any party becoming absolutely entitled to such money." The only question here is whether the trustees of the settlements of the married daughters and the trustees and executors of the deceased daughter are persons who have become absolutely entitled within the meaning of that section. We contend that they are. The trustees of the original will had no power of sale, and the corporation cannot pay the money to them; but the trustees of the three settlements and of *Frances Hankinson's* will have powers of sale, and can give good receipts for the money: *In re Sowry* (1); *In re East* (2); *In re Gooch's Estate* (3).

E. C. Dunn, for the Corporation, made no objection to the application.

Judgment.

JAMES, L.J.:—

I think the trustees of these settlements are parties who have become "absolutely entitled" within the meaning of the 69th

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matter between the corporation and the trustees of these shares, and I do not see how the trusts created by the will and the settlements in respect of these shares can be read as applying to rateable shares of the purchase and compensation moneys awarded upon a compulsory reference to arbitration under the Lands Clauses Acts, which took place between the corporation and the trustees of *Hobson's* will merely; and I have equal difficulty in seeing how the trustees of these particular shares can be considered as persons "absolutely entitled" to rateable shares of those moneys, within the meaning of the 69th section of the *Lands Clauses Act*, 1845. I have referred to the cases to which my attention was drawn by the counsel for the Petitioners, all except one of which appear to have been cited to the Court of Appeal in the case of *In re Sowry* (Law Rep. 8 Ch. 736), the excepted case being that of *In re Gooch's Estate* (3 Ch. D. 742), which was a case heard before Vice-Chancellor *Bacon* subsequently to *In re Sowry*, but in which that case does not appear to have been mentioned to the Vice-Chancellor. None of those cases remove the difficulty which I feel in the way of acceding to the application; but as both the Petitioners and the corporation desire that the fund should be dealt with as prayed by the petition, I have no objection to the case being mentioned to the Court of Appeal, with a view to the opinion of that Court being elicited whether I can properly make the order asked for.

(1) Law Rep. 8 Ch. 736.
(2) 2 W. R. 111.
(3) 3 Ch. D. 742.

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C. A. 1878 *In re* HOBSON'S TRUSTS.

section, and the Court will not inquire what the trusts are. My opinion is that when a share has been settled by a marriage settlement duly executed by an adult, and the trustees have a power of sale, the trustees are persons absolutely entitled to the share which has been vested in them. The same applies to the trustees and executors of the will of the deceased daughter. Therefore, as the corporation makes no objection, we will make the order asked for.

Judgment.

The order should be prefaced by the words, "The Court being of opinion that the trustees of the marriage settlements, and the trustees and executors of the will of *Frances Hankinson*, have become absolutely entitled to the respective shares."

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Gaunt, Manchester; R. F. Austin.*

In re MANSEL. RHODES *v.* JENKINS.

C. A. 1878 *Feb.* 20, 27.

[1877 M. 121.]

Practice—Times of Procedure—Setting down Appeal—Rules of Court, 1875, *Order* LVIII., *r.* 8.

Notice of appeal from an interlocutory order made on the 24th of January was given on the 13th of February for the 18th of February, but owing to a mistake of the solicitor's clerk was not set down till the 19th. The appeal came on to be heard on the 20th:—

Held, that, not having been set down till after the day for which notice was given, it must be dismissed:

Held, also, that leave to appeal notwithstanding the lapse of time ought not to be given, there having been no conduct on the part of the Respondent to raise an equity against him.

Statement.

THE Defendant *Mansel*, on the 13th of February, gave notice of appeal for the 18th of February from an interlocutory order made on the 24th of January. The appeal, owing to an oversight, was not set down till the 19th. It came on upon the 20th, when

Argument.

Higgins, Q.C., took the preliminary objection that it could not

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In re MANSEL.

RHODES v. JENKINS.

be heard, as not having been set down in due time: *In re National Funds Assurance Company* (1).

Glasse, Q.C., for the Appellant:—

In that case the appeal had not been set down. Here it has been set down, and that before the first day for hearing appeals from interlocutory orders since the notice of appeal was given.

Judgment.

THE COURT (*Jessel*, M.R., and *Baggallay* and *Thesiger*, L.JJ.), held that the objection must prevail, but gave the Appellant leave to make a special application if any case could be made for extending the time to appeal.

Argument.

Feb. 27. *Glasse*, Q.C., and *Levett*, applied for leave to appeal notwithstanding the lapse of time:—

We cannot allege any case of conduct raising an equity against the Respondents; the slip arose simply from the clerk mistaking the meaning of the rule, but we contend that in a case of this kind arising under a new practice time should be given where there has been no substantial delay. The object of the rule was that appeals should not be kept hanging over the heads of the parties, and there has been no delay here.

[JAMES, L.J.:—For that purpose a definite rule has been laid down, and the question is whether you come within it.]

According to the judgment of Lord Justice *Brett* in *In re National Funds Assurance Company* we are thrown back upon the old practice of the Court of Chancery, and this would not there have been an abandoned motion: *Turner* v. *Turner* (2); *Re Compton Smith* (3); *Wedderburne* v. *Llewellyn* (4).

Higgins, Q.C., and *Rawlinson*, *contrà*, were not called on.

Judgment.

JESSEL, M.R.:—

I am of opinion that it is impossible for us to accede to this application. The rule of practice has been laid down by the Court of Appeal in the case of *In re National Funds Assurance Com-*

(1) 4 Ch. D. 305.
(2) 2 D. M. & G. 28.
(3) 23 Beav. 284.
(4) 13 W. R. 939.

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C. A. 1878 *In re* MANSEL. RHODES v. JENKINS. Judgment.

pany (1), and is there stated so distinctly that nobody can misunderstand it, that an appeal must be set down before the day named in the notice of appeal. Acting on that rule, the Court of Appeal decided last week that, unless a case for indulgence was made out, the appeal in the present case must be dismissed, and we have no power to review that decision. Has any sufficient case for extending the time been made? No reason has been given but that the solicitor's clerk made a mistake as to the meaning of the rule. If that is to be allowed as a sufficient reason for relaxing the rules they might as well be repealed. The opposite party is not answerable for the mistake, and is entitled to the advantage of it, unless he has done something to mislead the applicant. What the effect of relaxing the rules would be may be judged from what has taken place this morning, more than an hour having been spent in the discussion of this and another application for relief against an appeal being out of time.

JAMES and BAGGALLAY, L.JJ., concurred.

Solicitors: *Nelson, Son, & Hastings; Walters, Young, & Co.*

Ex parte AARONSON. *In re* AARONSON.

C. A. 1878 *Jan.* 31; *Feb.* 28.

Liquidation Petition—Registration of Resolutions—Debtor having no Assets—Abuse of Procedure of Court—Examination of Debtor at Meeting—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 4—*Bankruptcy Rules*, 1870, *r.* 301.

A debtor who has practically no assets distributable among his creditors is not entitled to file a liquidation petition.

Resolutions for a liquidation by arrangement passed under such circumstances ought not to be registered, even though they do not include a discharge to the debtor.

Ex parte Walter (2) explained.

The answers given by a debtor at a liquidation meeting to questions put to him by the creditors respecting his affairs are to be taken as part of his statement of affairs.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 18th of September, 1877, *Andrew Aaronson* filed a liqui-

(1) 4 Ch. D. 305. (2) 2 Ch. D. 326.

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C. A. 1878 *Ex parte* AARONSON. *In re* AARONSON.

Statement.

dation petition. The first meeting of the creditors was held on the 10th of October. The debtor's statement of affairs then produced shewed that his unsecured debts (including debts entitled to be paid in full, which amounted to £47 3*s.* 6*d.*) were £1146 9*s.* 6*d.*, and that his assets were, stock-in-trade valued at £30, book debts estimated to produce £7, and furniture valued at £150, making a total of £187. Under the heading of "creditors partly secured" was entered the name of *L. Marcussen*, his security being estimated at £125, and the amount of his debt being stated as £183 11*s.* The following note was appended:—"The abovenamed *L. Marcussen* holds a bill of sale, dated the 20th of February, 1877, over the goods, &c., of the debtor, to secure a sum of £232; and since the filing of the petition Mr. *Marcussen* has seized a large portion of the debtor's furniture under such security, and the remainder has been seized and sold by the landlord. The furniture so seized by Mr. *Marcussen* will probably become an asset of the estate." In answer to questions put to him at the meeting, the debtor stated that the £150 worth of furniture was included in the bill of sale, and that if the bill of sale should be upheld there would be nothing for the creditors.

The creditors resolved upon a liquidation by arrangement, but did not grant the debtor a discharge. The registration of the resolution was opposed by a dissentient creditor, and the Registrar refused to register it, on the ground that the debtor had not, in his statement of affairs, shewn any assets available for distribution among his creditors within the requirements of the *Bankruptcy Act*, 1869. This decision was afterwards affirmed by Mr. Registrar *Hazlitt*, acting as Chief Judge.

Aaronson appealed.

Argument.

Winslow, Q.C., and *J. J. Sims*, for the Appellant:—

The resolutions ought to have been registered. By rule 301 of the Bankruptcy Rules, 1870, the passing of a resolution for liquidation by arrangement is made conclusive evidence that the debtor has complied with the provisions of the statute with regard to the statement of his affairs, and that has been decided to mean conclusive evidence upon the application to register the resolution: *Ex parte Walter* (1).

(1) 2 Ch. D. 326.

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[BAGGALLAY, L.J., referred to *Ex parte Page* (1).]

Argument.

There is nothing in the present case to shew that the majority of the creditors were not acting *bonâ fide*. The statement of affairs shewed a probability that there would be assets for distribution. No discharge being given to the debtor, the creditors will get all that they would get in a bankruptcy. *Ex parte Staff* (2) may be relied on against us, but it is inconsistent with *Ex parte Elworthy* (3).

E. C. Willis, for the opposing creditor :—

The result of the statement of affairs is that there are practically no assets. *Ex parte Staff* has never been questioned, and has been followed. If no immediate discharge is given to the debtor, the friendly creditors might give him one very soon, and thus release any property which he might afterwards acquire, and which the creditors would get if there was a bankruptcy. *Ex parte Elworthy* was a case of composition.

[BAGGALLAY, L.J. :—In *Ex parte Terrell* (4) the resolutions for a composition of 1*s.* in the pound would have been registered if security for the payment of the 1*s.* had been given.]

The majority cannot be acting *bonâ fide* in the interest of the creditors in passing liquidation resolutions when the debtor has nothing to divide among them.

Winslow, in reply :—

It by no means follows that a discharge will be given to the debtor. None has been given to him yet. Why should not the creditors be allowed to take from the debtor all that he has? All the costs of the proceedings have been paid, and the debtor is not discharged. This distinguishes the case from *Ex parte Staff*.

Judgment.

Feb. 28. BAGGALLAY, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) as follows :—

On the part of the Appellant it has been contended that the Registrar ought to have registered the liquidation resolution, and

(1) 2 Ch. D. 323.
(2) Law Rep. 20 Eq. 775.
(3) Law Rep. 20 Eq. 742.
(4) 4 Ch. D. 293.

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that it was not within his jurisdiction to refuse to do so, and in support of this view reliance has been placed upon the 4th sub-section of sect. 125 of the Act, and rule 301, and also upon the decision of this Court in *Ex parte Walter* (1).

By the 4th sub-section of sect. 125, the duties of a registrar in respect of the registration of a liquidation resolution are limited to an inquiry whether the resolution has been passed in manner directed by that section, and, if he is satisfied upon such inquiry that it has been so passed, the Act is imperative in its direction that he is forthwith to register the resolution, and also the statement of the assets and debts of the debtor, which, by the same section, the debtor is required to lay before the meeting at which the resolution is passed. The certificate of the registrar in the present case, of the ground of his refusal to Register, renders it unnecessary for us to do more than consider whether the statement of his affairs submitted by the Appellant to the meeting was sufficient to satisfy the requirements of the Act; in other respects the resolution may be treated as having been passed in the manner required by the Act. We pass on then to consider rule 301, which provides that the passing of a liquidation resolution "shall be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the statute with regard to the statement of his affairs required to be submitted to the general meeting of his creditors."

Now, previously to the decision of this Court in *Ex parte Walter*, doubts were entertained whether, according to the proper construction of rule 301, the passing of the resolution was to be conclusive evidence on the application to register, that all the provisions of the statute with regard to the debtor's statement of affairs had been complied with, or whether the rule only meant that it should be conclusive evidence after the registration had been effected, so that it could not afterwards be questioned by any dissentient or absent creditor.

The circumstances of *Ex parte Walter* were as follows:—The meeting had been duly convened, the debtor had produced a statement of his affairs which shewed unsecured debts to the amount of nearly £35,000, and assets to the value of upwards of £10,000,

(1) 2 Ch. D. 326.

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and resolutions were passed by the statutory majority for liquidation by arrangement. Everything was, upon the face of the proceedings regular, but some of the dissentient creditors objected to the registration, on the grounds that the statement of affairs was irregular in form; that it was untrue and insufficient; and that it did not disclose the whole of the debtor's assets and liabilities; and they were permitted by Mr. Registrar *Keene* to adduce evidence before him in support of this contention. Having heard the evidence, he came to the conclusion that the dissentient creditors had not made out their case, and he registered the resolution. This decision was, however, reversed by Mr. Registrar *Pepys*, sitting as Chief Judge, who was of opinion upon the same evidence that the statement of affairs was so inaccurate as to be delusive, and that it was to that extent fraudulent. But this Court was of opinion that, according to the true construction of rule 301, the passing of the resolution was intended to be conclusive evidence upon the application to register, that the debtor's statement of affairs was sufficient, and that the rule had the effect of excluding, upon an application for registration, the raising of any such question as was raised before Mr. Registrar *Keene*.

Though, however, the Court arrived at this conclusion in *Ex parte Walter* (1), in which the statement of affairs was, upon the face of it, sufficient, it recognised the distinction between such a case and one in which the statement might be, upon the face of it, insufficient, and in illustration of this distinction referred to *Ex parte Cockayne* (2), and *Ex parte Gibbs* (3), in which cases it was held that, where the debtor has not in his statement distinguished between his joint and separate debts and assets, a resolution founded upon that statement ought not to be registered.

It becomes necessary, therefore, to look into the statement of affairs which was laid by the Appellant before the meeting of his creditors. This statement included as an asset certain furniture, fixtures, and fittings, which were estimated to produce £150, and, if this item was rightly included as an asset, the statement shewed assets sufficient to pay a dividend of 2*s.* in the pound to the unsecured creditors. On the other hand, if this item ought to be

(1) 2 Ch. D. 326. (2) Law Rep. 16 Eq. 218.
(3) Law Rep. 10 Ch. 382.

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excluded from the assets, the statement did not shew any assets divisible amongst the unsecured creditors. [His Lordship then referred to the note relating to *Marcussen's* bill of sale, and to the debtor's examination at the meeting, and continued:—] We think that the Registrar was right in the conclusion at which he arrived, that the statement did not shew any assets for division among the creditors, and we think that he would have been justified in arriving at this conclusion without taking into consideration the answers given by the Appellant at the meeting.

Beyond the assertion that the furniture would probably become an asset, there is nothing whatever, either in the statement or in the bankrupt's answers, to shew, or even to suggest, that the bill of sale, which had been executed seven or eight months before the meeting, ought not to be upheld.

It does not appear whether the Registrar took into consideration the answers given by the Appellant to the questions put to him at the meeting, but, if he did, we think that he was justified in so doing. The object of the Act in directing that the debtor should attend at the meeting and answer such questions as should be put to him, obviously was to secure an explanation upon such portions of the statement as were deemed by the creditors to require explanation, and, for any purpose for which the statement itself might be looked into by the Registrar, the explanation of that statement given by the debtor at the meeting may, in our opinion, be taken into consideration by the Registrar; the answers may in fact be taken as part of the statement.

The question remains whether, having arrived at the conclusion that the statement did not shew any assets distributable amongst the creditors, the Registrar was justified in refusing to register the resolution. We think he was.

In *Ex parte Russell* (1), it appeared from the statement of affairs submitted to the meeting of creditors, that there were practically no assets available for a dividend, and this Court, being of opinion that the resolutions based upon that statement were not passed *bonâ fide* for the benefit of the creditors, dismissed an appeal which had been brought from the refusal of the Registrar to register the resolutions. It is true that *Ex parte Russell* was

(1) Law Rep. 10 Ch. 255.

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decided before this Court had put that stringent construction upon rule 301 which was put upon it in *Ex parte Walter* (1); but we think that the principle involved in it is right, and that we are not precluded by rule 301 from giving effect to it. We are of opinion that the procedure of the Court of Bankruptcy must not be made use of for a merely idle purpose. The appeal will be dismissed with costs.

Solicitor for Debtor: *F. W. Adams.*
Solicitors for opposing Creditor: *Dillon-Webb, Kelly, & Co.*

Ex parte BAUM. *In re* BAUM.

C. A. 1878 March 14.

Liquidation by Arrangement—Resolution to discharge Debtor—Vacating Registration—Mala fides on part of Debtor—Time for appealing—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 9—*Bankruptcy Rules*, 1870, *rr.* 143, 295, 302—*Undischarged Debtor—Costs.*

When a resolution to discharge a liquidating debtor has been passed by the statutory majority and registered, the registration will be vacated if it is shewn that any one of the votes of the majority was obtained by a malpractice on the part of the debtor, such as bribing the creditor to give his vote, even though, if the vote thus procured were struck off, the statutory majority in favour of the discharge would remain:—

An application to vacate the registration of a resolution on the ground of fraud or *mala fides* is not an appeal to which the limit of twenty-one days imposed by rule 143 applies.

An undischarged debtor will not be ordered personally to pay the costs of his unsuccessful appeal beyond the deposit.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 1st of September, 1876, *John Baum* filed a liquidation petition. His creditors resolved upon a liquidation by arrangement, and appointed a trustee, but did not then grant the debtor a discharge. On the 28th of May, 1877, a general meeting of the creditors was held, at which a special resolution was passed by the proper statutory majority granting the debtor a discharge. On the 6th of June application was made to the Registrar to register the

(1) 2 Ch. D. 326.

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Ex parte BAUM. *In re* BAUM.

Statement.

resolution. The application was opposed by a dissentient creditor named *Isaacs*, but the Registrar decided to register the resolutions, and the certificate of the discharge was signed on the 8th of June. On the 29th of June *Isaacs* gave notice of an application to the Court to vacate the registration and cancel the certificate. Mr. Registrar *Murray* granted the application, on the ground that the proof of one creditor who had voted in the majority had been improperly admitted, and that another creditor had been bribed by the debtor to vote in favour of the discharge. The same solicitor was acting for the debtor and for the trustee.

The debtor appealed.

Argument.

Winslow, Q.C., and *Nicholson*, for the Appellant:—

The application to vacate the registration was made too late; it should have been made within twenty-one days from the 6th of June: Bankruptcy Rules, 1870, rr. 143, 295, 302.

[JAMES, L.J.:—We must hear the case on the merits.]

The Registrar has come to a wrong conclusion on the evidence. But, even if he is right, and all the votes objected to are struck off, there will still remain the statutory majority in favour of the discharge. This is important as negativing any inference of fraud, for if the debtor and his solicitor found that they had a majority without the votes which are objected to, what object could they have had in committing a fraud?

[JAMES, L.J.:—The majority was a narrow one, and these votes may well have appeared to be very important.]

E. C. Willis, and *H. Reed*, for the opposing creditor, were not heard.

Judgment, James, L.J.

JAMES, L.J.:—

I am clearly of opinion that the decision of the Registrar must be affirmed. He, acting as Judge and jury, has arrived at the conclusion that there was positive malpractice—not merely a mistake, but positive malpractice—on the part of the debtor, by or through his solicitor, in respect of this meeting at which the debtor sought to obtain his discharge. As to that conclusion of fact, I see no ground whatever for differing from the Registrar. He had the

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great advantage over us of seeing all the witnesses and hearing the whole of their testimony on every part of the case, and we cannot, as it appears to me, differ from his conclusion upon that matter of fact.

Then, if that be so, it is established that there was malpractice on the part of the debtor or his solicitor, and it appears to me that it is no answer to say, "Well, strike out every vote in regard to which you have proved malpractices, and there will still be left the statutory majority." That would be too dangerous. The result would be to impose on the dissentient creditors the task of going through the whole of the votes to see if there had been other malpractices of the same kind. What security has the Court that similar malpractices may not have affected the admission of other debts? If some fictitious debts were admitted, what security is there that other debts were not admitted upon equally fictitious grounds? If one creditor was bribed or his vote purchased, what security can the Court have that the same thing has not been done with regard to others? Exactly the same principle must apply as is applied to the election of members of Parliament. If a man is returned by a majority of 10,000 votes, yet if you can prove that, either personally or through an agent, he has bribed one single voter, the election must be set aside. The same principle applies to these creditors' resolutions. It is always difficult, indeed it is almost impossible to prove these things. A man may be in a position to prove malpractice, but if he were bound to prove malpractice to such an extent as would alter the majority, that would be imposing an intolerable burden upon him.

Judgment, James, L.J.

I am of opinion that it is necessary for the maintenance of honesty with regard to all these transactions that the parties should be held strictly to their powers, and that the proof of actual malpractice (not merely irregularity or mistake, but actual malpractice) on the part of the debtor, personally or by his solicitor, in regard to the proceedings at a meeting, is sufficient to vitiate everything that is done at the meeting.

COTTON, L.J.:—

Cotton, L.J.

I am entirely of the same opinion. I think it is unnecessary to enter into the question, which indeed it is hardly possible to solve,

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C. A. 1878 *Ex parte* BAUM. *In re* BAUM.

Judgment, Cotton, L.J.

whether the votes which ought to have remained would or would not have made up the requisite majority. The learned Registrar heard the witnesses cross-examined, and he came to the conclusion (from which I certainly do not dissent, and with which, if it were necessary for me to express an opinion, I agree) that there was *mala fides* on the part of the debtor, that votes in favour of the resolution of discharge were obtained by improper means. The Act of Parliament gives to the majority of the creditors very great power as regards the release of the debtor from his liabilities; it gives them power, by a resolution passed by the necessary majority in number and value, against the will of the minority, to grant the discharge of the debtor. That being so, it is, in my opinion, the duty of the Court to see whether there was anything like fraud in obtaining the majority, and if there was, the resolution must be considered as a nullity. The dissentient minority are not to be bound by the resolution of the majority when it is shewn that there was *mala fides* in obtaining the majority. It is not, in my opinion, sufficient to shew that, after striking out all the votes proved to have been obtained *malâ fide*, there is still a majority. Once shew that there was *mala fides* in obtaining or in endeavouring to obtain the majority, and, in my opinion, the Court ought to hold that the majority cannot, by a resolution thus tainted with fraud, bind the minority to discharge the debtor.

In my opinion, therefore, the order of the Registrar was quite right.

Thesiger, L.J.

THESIGER, L.J.:—

I am also of the same opinion. It is attempted to bind a dissentient minority of creditors by the resolution of the majority passed, be it observed, in favour of the debtor. Under such circumstances there should be absolute faith in the transaction out of which that resolution arose, and, although the striking out of the votes which are the immediate subject of the alleged *mala fides* may not in itself turn the scale of the majority required by the Act, yet if there is sufficient evidence to shew that the resolution was not obtained absolutely *bonâ fide* it is not for us, or for any Court, to go into the question, which must always be more or less difficult to answer, whether the *mala fides* may or may not have

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influenced other votes. It is sufficient that there has been *mala fides*. In such a case the dissentient minority is not to be bound.

JAMES, L.J.:—The appeal will be dismissed with costs.

Winslow, Q.C.:—It is contrary to the practice of the Court to give costs against an undischarged bankrupt or debtor.

E. C. Willis:—We are entitled to take the deposit in payment of our costs.

JAMES, L.J.:—You will take your costs out of the deposit; costs not exceeding the amount of the deposit.

Solicitors for Appellant: *Evans & Eagles.*
Solicitor for Respondent: *W. H. Roberts.*

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M. R.

1878

Jan. 18.

In re HYDE & CO.'S TRADE-MARK.

Trade-mark—Registration—Application to rectify Register—Laches—Costs—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 5.

On an application under sect. 5 of the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), to remove from the register a trade-mark of *H. & Co.*, who had registered it as an old mark after advertisement in the *Trade Marks Journal*, claiming forty-one years' user, it appeared that for the greater part of that time the mark had been a common mark, and for about six years had been so to the knowledge of *H. & Co.*, and that the applicants, who had long used the same trade-mark, were not aware of the advertisement, and had not opposed the registration:—

Held, that the trade-mark must be ordered to be removed from the register; that there had been no laches on the part of the applicants, and that the Respondents must pay the costs.

Statement.

THIS was a motion under sect. 5 of the *Trade Marks Registration Act*, 1875, on behalf of various firms of manufacturers of sealing-wax, that the register of trade-marks might be rectified by removing the trade-mark "*Bank of England*," registered by Messrs. *Hyde & Co.*, being the trade-mark used by them on the sealing-wax which they manufactured.

It appeared that *Hyde & Co.* claimed forty-one years' user of the trade-mark, but that it had also been commonly used in the trade for many years, and one or more manufacturers claimed to have used it for thirty years, others for sixteen and ten years.

In 1876, *Hyde & Co.* applied to the Registrar of Trade Marks to be allowed to have the mark "*Bank of England*" registered as an old mark, and in July, 1876, they inserted an advertisement of their application in the *Trade Marks Journal*. No opposition having been made, the trade-mark was registered. *Hyde & Co.* subsequently issued the following circular to the trade:—"We beg to intimate to you, that, as the original makers of '*Bank of England*' wax, we have taken advantage of the *Trade Marks Act* (38 & 39 Vict. c. 91), and have registered our exclusive right to the stamping of sealing-wax with the word 'Bank.' We are instructed that since the 1st of July last, it has become illegal for any maker in the *United Kingdom* other than ourselves to stamp sealing-wax with the word 'Bank.'"

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On this circular becoming known to the trade steps were taken which led to the present application.

It appeared from the affidavits filed on behalf of *Hyde & Co.* that they had known of the user of the mark by other firms for above six years.

Argument.

Chitty, Q.C., and *John Cutler*, in support of the motion.

Aston, Q.C., and *S. Dickinson*, for Messrs. *Hyde & Co*:—

In this case *Hyde & Co.* claim an uninterrupted user of their trade-mark for forty-one years, and for many years an exclusive user. They were the first to use and the first to register it. They had for many years an exclusive user. They applied openly to be put on the register, having inserted an advertisement in July, 1876, in the *Trade Marks Journal* in the usual way. No objection to that application was made on behalf of any of the firms who now seek to vacate the registration. They believed that they were entitled to have the trade-mark registered, though, if they had been aware of the length of user now alleged by some of the applicants, they would in all probability never have applied. On their behalf we cannot oppose the present application, but we contend that the applicants, after having stood by when notice had been given by the advertisement, and allowed the trade-mark to be registered, should not be allowed their costs as against the Respondents.

Judgment.

JESSEL, M.R.:—

The question I have to decide is one of very considerable importance as regards the working of the *Trade Marks Registration Act*, 1875. Persons who register under the Act, and whose title is not impeached within five years, acquire an absolute title to a trade-mark to which they may not have been previously entitled at all. Therefore it is incumbent on everyone who disputes the title to a trade-mark to apply as speedily as possible to remove the mark from the register. Those who register a mark to which they are not entitled do so at their own risk and peril. They must satisfy themselves before they register that it is a mark to which they are entitled, and I do not see any reason whatever for drawing

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M. R. 1878 — *In re* HYDE & Co.'s TRADE-MARK. — Judgment.

any distinction between one title and another. If a man has a good title he has a right to register, and if he has no title, he ought not to attempt it. Of course there may be special circumstances in peculiar cases which induce a man to register, upon the representation of another that he had not a title, which prevent that other asking for costs against him, or asking to have the trade-mark removed from the register. But, as a general rule, it must be understood that every man registers at his own peril.

The opponents who come here say that this particular mark had ceased to be a trade-mark for very many years; whether it is thirty years, or twenty-five years, or twenty years, is immaterial. For many years before the passing of the *Trade Marks Registration Act* it had ceased to be a trade-mark. The words "*Bank of England*" had been used by a great number of manufacturers of sealing-wax. They were words commonly used in the trade, and no longer distinguished one man's goods from another man's, and this fact was known to the persons who registered it, though they seem to have had a mistaken notion of the law on the subject.

As I understand Mr. *Aston*, the gentlemen who registered it thought that as they were the first persons who used this mark, which had become common, they could now assert a right to the mark as a trade-mark. That is not the law. I cannot, because they make a mistake as to the law, knowing the facts, exonerate them from the consequences of that mistake. Every man, knowing the facts, who chooses to act upon his own opinion of the law—who does not even take the trouble to consult a professional adviser—must take the consequences of so acting. Then it is said that the trade should have taken notice of the advertisement, which is inserted pursuant to the provisions of the Act of Parliament, to give notice to all the world of the intended registration. But the answer to that is, that there is no obligation to see the advertisement. It is as a precaution that the Act gives people an additional opportunity, besides looking at the register, of knowing what is going to be done. But if a person interested does not see the advertisement, he is in no worse position than he would have been before. He must use due diligence, when the fact comes to his knowledge, to remove the trade-mark. These gentlemen having registered the thing—I have no reason to doubt, in the *bonâ fide*

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belief that they were entitled to register—gave notice to the trade. The trade at once came forward and said, in effect: "This registration is illegal; it interferes with our trade; we are as much entitled to have our sealing-wax stamped with the mark '*Bank of England*' as the persons who have registered it. If we do not interfere speedily they will get an absolute title under the Act, and therefore we come forward to remove the mark from the register as being a wrongful registration."

When the notice of motion is given, what do the Respondents do? Do they yield? Not at all. They let the case come on, and it is not until after their counsel have read the evidence on the other side, and found that they could not fairly occupy the time of the Court, having regard to the interests of other suitors, by discussing that which is really upon the evidence an unarguable case, that they very properly admit that they cannot argue the case upon its merits. The evidence is overwhelming, and they say: "We must now admit the trade-mark to have been wrongfully registered, and submit to its being taken off the register; but we ask, although we have been wrong from the beginning to the end by putting this mark upon the register, that we may not pay the costs." It appears to me, so far from there being any reason to take this case out of the general rule, there is every reason for keeping it in the general rule, that the person who is wrong in litigation should pay the costs. It is immaterial whether some of the manufacturers were in the wrong many years ago; the only thing I have to consider is, who was wrong in registering the trade-mark? At that time the right had really been lost, even if it had ever belonged to the Respondents, and it appears to me that the proper order to make is to take the trade-mark off the register and order the Respondents to pay the costs.

Solicitor for Applicants: *J. Seymour Salaman.*
Solicitors for *Hyde & Co.*: *Lambert & Co.*

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M. R.

1878

Feb. 23.

In re CARDROSS'S SETTLEMENT.

Infant—Power coupled with an Interest—Marriage Settlement—Infant Married Woman—Consent to Investment.

An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exerciseable during minority.

By a settlement made with the sanction of the Court, upon the marriage of a lady then, and therein described as, "an infant of seventeen years," certain funds belonging to her were vested in trustees upon trust to retain existing investments or reinvest "with the consent" of the lady and her husband during their joint lives; the lady taking the first life interest under the settlement:—

Held, that the lady had power to consent to a proposed reinvestment, notwithstanding her minority.

Statement.

BY the settlement dated the 16th of October, 1876, and made with the sanction of the Court, prior to the marriage of Lord and Lady *Cardross*, Lady *Cardross* being then a ward of Court, and described in the settlement as "an infant of seventeen years and upwards," certain sums in Consols and New Three per Cent. Annuities, the property of Lady *Cardross*, were vested in trustees upon trust after the solemnization of the marriage to retain the existing investments or to reinvest as therein mentioned, "with the consent" of Lady *Cardross* and her husband during their joint lives, and after the decease of either of them with the consent of the survivor of them, and after the death of such survivor, at the discretion of the trustees; Lady *Cardross* taking the first life interest in the settlement funds.

A reinvestment of part of the trust funds being proposed, the question arose whether, as Lady *Cardross* was still a minor, she was able to give her consent thereto.

The question was raised by a petition by the trustees under 22 & 23 Vict. c. 35, for the opinion and advice of the Court as to whether they would be justified in making the proposed reinvestment "with the consent in writing" of Lord and Lady *Cardross*.

Argument.

G. Miller, for the Petitioners:—

There appears to be no express decision on the point. It is clear that an infant may exercise a power which is not coupled

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with an interest; and in *Preston* on Abstracts (1) it is said that an infant may execute a power even though coupled with an interest "if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority;" and this passage has been quoted without disapproval by Lord *St. Leonards* in *Sugden* on Powers (2), and by Vice-Chancellor *Wood* in *King* v. *Bellord* (3).

Argument.

[JESSEL, M.R.:—The passage is also quoted, but without comment, in *Simpson* on Infants (4).]

In *Hearle* v. *Greenbank* (5) Lord *Hardwicke* held that an infant could not execute a power over real estate, though it appears from his judgment, as interpreted by *Preston*, that an infant might exercise such a power if the minority is expressly dispensed with, or there is an indication of intention that the power might be exercised during minority.

In the present case, however, the property subject to the power is not real estate, but pure personalty, to which, had it not been for this settlement, Lord *Cardross* would have been absolutely entitled. He is therefore in reality the settlor and the author of the power; and considering that the fact of Lady *Cardross* being a minor is stated on the face of the settlement, it may fairly be inferred that the intention of the parties was that this power might be exercised by her at any time and notwithstanding minority.

On principle, there seems to be no reason why such a power as this should not be exerciseable by an infant. An infant of fourteen can appoint a guardian; and even a feoffment by an infant was not void, but only voidable.

JESSEL, M.R., after stating the facts, continued:—

Judgment.

The real question I have to decide is, whether, Lady *Cardross* being still a minor, the trust for investment can at present be exercised at all.

Now when you look at the settlement itself it is manifest that in giving this power, exerciseable during the joint lives of Lord

(1) 2nd Ed. vol. i. p. 326.
(2) 8th Ed. p. 911.
(3) 1 H. & M. 343, 347.
(4) Ed. of 1875, p. 40.
(5) 3 Atk. 695.

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M. R. 1878 *In re* CARDROSS'S SETTLEMENT. Judgment.

and Lady *Cardross*, it was contemplated that it might have to be exercised during their joint lives, and possibly during the minority of Lady *Cardross*. Indeed, it would be most improbable that some change of investment would not be required or be found desirable before Lady *Cardross* attained twenty-one. Therefore, on the face of this settlement, there is evidence of contemplation on the part of the author of this power that the power might be exercised during minority. The question is whether that is sufficient.

Under the settlement Lady *Cardross* takes the first life interest, so that she has a power coupled with an interest; and, accordingly, it then becomes a question whether such a power can be exercised by an infant. It is singular that the point appears never to have been a subject of actual decision, though Mr. *Preston* has expressed an opinion upon it. In his work on Abstracts, after stating that an infant may execute an authority not coupled with an interest, he says this (1), "He may also execute a *power* coupled with an interest, if his infancy be dispensed with; or if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority." Then he goes on, "A power, however, given to an infant will not be considered as authorizing an exercise during his minority, except the minority be expressly dispensed with, or there be some circumstance which discloses an intention that the power may be exercised during minority." And as an authority for the latter proposition he cites *Hearle* v. *Greenbank* (2). I do not find that proposition so laid down by Lord *Hardwicke* in that case, but what Mr. *Preston* is probably referring to are certain passages in Lord *Hardwicke's* judgment, where he says (3), "Taking it therefore in general, I am of opinion an infant cannot execute such a power," that is, a power of appointment over real estate. And he says a little further on, "What had the father therefore in view? Why, to exclude the disability of coverture, and this was all he intended to guard against; and if he likewise intended to exclude the disability of infancy, he would have taken care equally to express it:" that is to say, Mr.

(1) Page 326. (2) 3 Atk. 695.

(3) 3 Atk. 714.

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Preston considers Lord *Hardwicke* to mean that if the father had expressly excluded the disability of infancy, the power would have operated. That was probably the ground of Mr. *Preston's* statement.

Now the first of the two passages I have quoted from Mr. *Preston's* book has been cited as law—at all events it has been cited without comment—by Lord *St. Leonards* in his work on Powers (1), and it was also referred to by Lord *Hatherley*, when Vice-Chancellor, in *King* v. *Bellord* (2), though the decision in that case was upon another point. The Vice-Chancellor says this (3), "There can be no doubt upon the authorities from the earliest times, that if a man, by his will, gives an infant a simple power of sale without an interest, the infant may exercise it." Then he says, "There is an opinion of Mr. *Preston's* mentioned without disapproval by Lord *St. Leonards*, that an infant can exercise a power even though it be coupled with an interest; but that is very different from selling an estate vested in the infant by a devise in fee."

Now, as I understand those observations of the Vice-Chancellor, he does not disapprove of that opinion of Mr. *Preston's*, and it certainly seems to me to be consonant with good sense; and considering that the point now comes before me for actual decision for the first time, I will state that in my opinion it is good law that an infant can exercise a power even though it be coupled with an interest, where an intention appears that it should be exerciseable during minority.

The inquiry will therefore be answered in the affirmative.

Solicitors: *Lanfear & Stewart.*

(1) 8th Ed. p. 911. (2) 1 H. & M. 343.
(3) 1 H. & M. 347.

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M. R. 1878 March 2.

CHAPMAN *v.* REAL PROPERTY TRUST, LIMITED.

[1878 C. 72.]

Practice—Absence or Vacancy in Office of Judge—Judge rising for Short Vacation—Application to Appeal Judge—Injunction—Transfer of Action—Judicature Act, 1873, *s.* 51—*Rules of Court*, 1875. *Order* LI., *r.* 2.

Order LI., rule 2 (Rules of Court, 1875), has reference only to the transfer of an action from one Division to another, and does not authorize a transfer from a Judge of one Division to another Judge of the same Division.

Whenever during the regular sittings of the High Court of Justice any Judge of the High Court is absent from any cause, as for instance, through having risen for a few days' vacation, applications of an urgent nature in any action pending before such Judge will be heard and disposed of by the Master of the Rolls or any other Judge of the Court of Appeal, under sect. 51 of the *Judicature Act*, 1873, upon a request being obtained from the Lord Chancellor.

Statement. THE writ in this action, which was for an injunction, had been marked before Vice-Chancellor *Malins*, but the Vice-Chancellor having risen for a few days' vacation, and an interim injunction being required immediately,

Argument. *Crossley*, for the Plaintiff, now applied for the injunction *ex parte*, the Defendant not having yet been served with the writ, and asked that, if necessary, the action might be transferred to this branch of the Court: Rules of Court, 1875, Order LI., r. 2; *Hillman* v. *Mayhew* (1); though apparently under sect. 51 of the *Judicature Act*, 1873, his Lordship as a Judge of Appeal had authority, upon the request of the Lord Chancellor, to act for any Judge of the High Court who might at any time be absent from illness "or any other cause."

Judgment. JESSEL, M.R.:—

Order LI., rule 2, and the case referred to in the Exchequer Division, have reference only to a transfer from one Division to another, not to a transfer from a Judge of one Division to another Judge of the same Division. It appears to me that I have no jurisdiction under the Judicature Acts or Orders, as a Judge of

(1) 1 Ex. D. 132.

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first instance, to hear an application in this action or to order the action to be transferred to this branch of the Court; but on the Plaintiff obtaining a request from the Lord Chancellor for the purpose, under sect. 51 of the *Judicature Act*, 1873, I will then, as a Judge of the Court of Appeal, hear and dispose of this application.

M. R. 1878 CHAPMAN v. REAL PROPERTY TRUST, LIMITED.

Solicitor: *J. E. Turner.*

In re RADCLIFFE, DECEASED.
EUROPEAN ASSURANCE SOCIETY *v.* RADCLIFFE.

[1877 R. 7.]

M. R. 1878 *March* 4.

Creditors' Action—Executor paying one Creditor in full after Writ—Conflicting Rules of Law and Equity—Judicature Act, 1873, *s.* 25, *sub-s.* 11.

Where an executor or administrator, after the commencement of a creditors' administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under *Judicature Act*, 1873, s. 25, sub-s. 11, and he will accordingly be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment.

To prevent such payments being made in any such action, the Plaintiff should, immediately upon issuing the writ, apply for and obtain a receiver.

Statement.

THIS was an administration action by the *European Assurance Society* on behalf of itself and of all other creditors of a testator who died insolvent in July, 1876.

The writ was issued in January, 1877.

The Defendant, the testator's widow and executrix, after having had notice of the action and undertaken by her solicitor to appear thereto, voluntarily paid two of the creditors in full.

The action now came on for trial.

Argument.

Chitty, Q.C., and *Romer*, for the Plaintiff:—

The only question is whether, in taking the accounts of the Defendant as executrix, she ought to be allowed these payments as against the unsatisfied creditors.

The rule at law undoubtedly is that, after the commencement of a creditor's action against an executor, a voluntary payment by

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M. R. 1878 — *In re* RADCLIFFE, DECEASED. EUROPEAN ASSURANCE SOCIETY *v.* RADCLIFFE. — Argument.

the executor to one creditor, after notice of the action, will not be allowed: *Williams* on Executors (1).

In the equity case of *Darston* v. *Lord Orford* (2), Lord Keeper *Wright* followed that rule, holding that a bill in equity was equivalent to an action at law; but his decision was afterwards reversed by the House of Lords (3). The Common Law rule was also followed in *Parker* v. *Dee* (4). In *Maltby* v. *Russell* (5) Sir *John Leach* followed the decision of the House of Lords in the former case, and held that an executor or administrator might, after the institution of a creditor's suit and before decree, pay any particular creditor in preference, and would be allowed such payment in passing his accounts.

Ince, Q.C., and *Bardswell*, for the Defendant:—

If there is any conflict between the rules of law and equity with reference to any particular matter, the rules of equity are now to prevail: *Judicature Act*, 1873, s. 25, sub-s. 11.

Judgment.

JESSEL, M.R.:—

There will be the usual judgment for administration. With regard to the particular question now raised, the equity rule established by the House of Lords in *Darston* v. *Lord Orford* must now prevail both at law and in equity, and therefore if an executor or administrator, after the commencement of a creditor's action and before judgment, voluntarily pays any creditor in full, he will be considered as having made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment. The Defendant will therefore be allowed these two payments.

The only way to prevent such payments being made is by the Plaintiff, upon issuing the writ, immediately applying for and obtaining a receiver.

Solicitors: *Mercer & Mercer; J. H. Lydall*, agent for *T. & T. Martin, Liverpool.*

(1) 7th Ed. pp. 1033, 1037.
(2) Prec. Ch. 188.
(3) Colles, 229.
(4) 2 Ch. Ca. 200; 3 Sw. 529, n.
(5) 2 S. & S. 227.

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CHILTON *v.* CORPORATION OF LONDON.

M. R.
1878
March 4.

[1878 C. 16.]

Commoner—Profit à prendre—Right of Lopwood—Grant to Inhabitants of a Parish—Corporation—Action by one Inhabitant—"Inhabitant"—Right claimed by Occupier of House illegally erected—Presuming Act of Parliament—Motion on Defendant's Admissions—Admission of non-existent Right—Rules of Court, 1875, *Order* XL., *r.* 11.

A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by Crown grant or Act of Parliament.

A grant by the Crown of a *profit à prendre* out of Crown lands to the inhabitants of a parish, constitutes the inhabitants a corporation *quoad* the grant, and an action to establish any such right is maintainable only by the inhabitants as a corporation, and not by an individual inhabitant suing on his own behalf alone:—

Semble, a grant to the "inhabitants" of a parish lying within a manor of a *profit à prendre* out of the manorial waste, means a grant to the inhabitants of houses lawfully erected within the parish, and does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed.

The Court will not presume a non-existent Act of Parliament as an origin for an alleged right.

Willingale v. *Maitland* (1) explained.

A Plaintiff moving for judgment under Rules of Court, 1875, Order XL., r. 11, on admissions in the Defendant's pleadings, must have a clear case, and the mere admission or non-denial by the Defendant of a right asserted by the Plaintiff, but which has in fact no existence in law, is not sufficient to entitle the Plaintiff to a judgment establishing the right.

Statement.

MOTION for judgment on admissions in pleadings (Rules of Court, 1875, Order XL., r. 11).

The statement of claim contained the following allegations:—

Par. 2. "The Plaintiff is the lessee for a term of ninety-nine years, commencing in the year 1868, of a certain hotel, called the *Robin Hood Hotel*, in which the Plaintiff has for some years past resided, and now resides, with a cottage and certain lands held therewith, situate in the parish of *Loughton*, in the county of *Essex*, and is also the lessee for a term of ninety-nine years, com-

(1) Law Rep. 3 Eq. 103.

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mencing in the year 1868, of another cottage and lands held therewith, adjoining the said hotel, and situate in the same parish. The said hereditaments comprised in the said leases respectively are situate within the ambit of the manor of *Loughton*, and within the precinct of *Epping Forest*, and formed part of the waste of the said forest, and were enclosed from the said waste by the lord of the said manor, with the consent of the homage at the manorial court, at some time since the 21st day of August, 1851, and the said hotel, cottages, and other buildings upon the lands so enclosed, were erected at some time before the 21st day of August, 1871. At the time when the said enclosure was made, such enclosures were generally believed to be lawful, but such belief was mistaken, and the hereditaments so enclosed still remain in law subject to the rights of common formerly exercised thereon."

Par. 4. "There is vested in the inhabitants of the said parish of *Loughton*, within the ambit of the said manor of *Loughton* (of whom the Plaintiff is one), the right from the hour of 12 o'clock at night on the 11th day of November in every year, until the same hour on the 23rd day of April in the succeeding year, to cut or lop, under the name of 'lopwood,' the boughs and branches of the trees growing upon the waste lands of the said forest within the ambit of the said manor"—except upon certain lands specified—"in such a way as not to destroy or unnecessarily injure the said trees, for the proper use and consumption of such inhabitants as fuel within the said manor and parish of *Loughton* (which said right is hereinafter called the 'right of lopwood')."

The statement of claim further alleged that the Defendants had recently purchased about 3000 acres of the forest-waste situate within the limits of several manors, including the manor of *Loughton*, to hold the said lands as open spaces for ever, subject to such rights of common and rights of lopwood, cutting and carrying away wood, as the said lands were subject to at the time of their said purchase: that in the course of making a pond upon the forest-waste purchased by them in the parish of *Loughton*, the Defendants "by their workmen and agents had lately cut down and carried away all the trees (upwards of forty in number) growing upon a part of the said waste, about two acres in extent, where the Plaintiff and the other inhabitants of the said parish of

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Loughton were entitled to use their said right of lopwood, and had thereby disturbed and materially injured the said right of lopwood."

The Plaintiff accordingly claimed "an injunction restraining the Defendants, their servants, agents and workmen, from digging up, cutting down, destroying, or injuring, any of the trees growing on the waste of the said forest lying within the ambit of the said manor of *Loughton*, so as to interfere with the said right of lopwood to which the Plaintiff is entitled as aforesaid."

The Defendants delivered a defence and counter-claim, in which they admitted that the Plaintiff was the occupier of the *Robin Hood Hotel*, and that he had for some years past resided, and then resided, therein. They also admitted the other allegations in the 2nd paragraph of the statement of claim, with the exception that they did not know the precise extent of the Plaintiff's interest in the hereditaments enclosed. They also admitted the statements in the 4th paragraph, "but with the qualification that the right of lopwood therein mentioned is limited to the cutting of such of the boughs and branches of the trees subject to the said right as are above the height of seven feet from the ground, and that certain trees, locally called 'spears,' growing upon the waste lands of the said forest within the ambit of the said manor, are not subject to the said right of lopping; and except that the corporation do not admit that the said *John Chilton* (the Plaintiff), as the occupier of a house built upon land which forms part of the waste of the said forest, or otherwise, is an inhabitant of the said parish entitled to exercise the said right."

The Defendants further admitted that, in making the pond referred to by the Plaintiff, "a few trees, but, as they believed, much less than forty in number, were cut down and carried away, and that such trees were growing upon a part of the waste where the inhabitants of the said parish of *Loughton* are entitled to use their said right of lopwood; but they deny that the said *John Chilton* is an inhabitant entitled to use the said right; and they deny that they have thereby disturbed and materially, or in fact, injured, the right of lopwood belonging to the said inhabitants; and they do not admit that the said trees were trees which were subject to the said right of lopwood."

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Upon the Defendants' admissions of fact as to the right of lopwood the Plaintiff now moved for an injunction in the terms of his claim.

Elton, for the Plaintiff:—

The right of lopwood being admitted by the Defendants, I submit I am entitled to the injunction. In *Willingale* v. *Maitland* (1) a bill was filed by inhabitants of this very parish of *Loughton* to establish the identical right I now claim. The bill alleged a Crown grant of the right, and Lord *Romilly* held, upon demurrer, that it was a good grant. I only cite that case as shewing that the right is one which has been already recognised by the Court. It is sufficient for the present purpose that my right is admitted by the Defendants, and on that admission I rely.

[JESSEL, M.R.:—This is simply an action by an inhabitant, and *Gateward's Case* (2) has decided that inhabitants, as such, cannot have a *profit à prendre* in the soil of another. Have you any authority before or since that case to shew that inhabitants of a parish, as such, can have a right of lopwood?]

No. *Willingale* v. *Maitland* is the only case to be found upon the subject.

[JESSEL, M.R.:—The right which Lord *Romilly* allowed in that case, which was heard on demurrer, was not a right in the inhabitants for their own benefit, but a right in the inhabitants as a corporation for the benefit of the poor of the parish, the right having been created by an alleged Crown grant, which was admitted for the purposes of the demurrer; but there is no such grant alleged here. If, then, the inhabitants can only claim as a corporation, and the Plaintiff here is only suing as an individual inhabitant, you have an admission of a right which has no existence in law. Is the Court in that case bound to recognise it as an existing right? The Court is bound to decide according to law.]

The right is one which may possibly have some existence. I would ask your Lordship to presume a lost grant, or the possi-

(1) Law Rep. 3 Eq. 103. (2) 6 Rep. 59 b.

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bility of there having been an Act of Parliament creating the right. That a right vested in a body of persons may be asserted by any one of them has been recognised by several old authorities: for instance, where a body of persons have a right of cutting thorns or boughs, an action to prevent interference with that right is maintainable by any one of them: *Dowglas* v. *Kendall* (1); *Crogate* v. *Morris* (2). The latter case cites (3) *Whitehand's Case*, "where many copyholders prescribe to have loppings and toppings of pollards and hasles growing upon the waste of the lord, and the lord cuts them, and one copyholder only brings his action upon the case; and adjudged that it was very well maintainable, notwithstanding that every other copyholder may have the same remedy."

[JESSEL, M.R.:—The Defendants deny that you are an inhabitant: how do you get over that?]

They admit that I reside in the hotel, and that I have resided there for some years. That is a sufficient admission that I am an inhabitant, and the right of possession thus admitted is sufficient to enable me to maintain the action.

Chitty, Q.C., and *W. R. Fisher*, for the Defendants:—

[JESSEL, M.R.:—Mr. *Chitty*, I only wish to hear you on the question of costs. You have admitted the Plaintiff's right; you also admit that he resides in the parish, and yet you say he is not an inhabitant.]

We deny the Plaintiff's right to sue. The word "inhabitant" is too vague: it has not in itself any legal meaning and requires definition: *Rex* v. *Mashiter* (4).

The Plaintiff should have shewn that as one of the inhabitants of the parish, treating them as a corporation, he was entitled to this right; but that he has not done. Moreover, upon the Plaintiff's own admission, his house stands on land which is itself subject to rights of common. The house is thus an interference with those rights of common, and has therefore been unlawfully erected, and the Plaintiff cannot, we submit, claim this right as an inhabitant of a house which has been erected contrary to law.

(1) Brownl. & Gold. part i. p. 219.
(2) Ibid. part ii. p. 146.
(3) Brownl. & Gold. part ii. p. 149.
(4) 6 A. & E. 153.

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JESSEL, M.R.:—

I think you must have your costs, Mr. *Chitty*. A Plaintiff who comes on admissions made by a Defendant must have a clear case. Now, I can see all sorts of difficulties about the Plaintiff's case; some of them so serious that I think he had better consider whether he should proceed any further with his case at all.

In the first place, the right alleged is one which I do not understand has existence in law. It is thus stated in paragraph 4 of the statement of claim:—[His Lordship read the paragraph.] Now, it has been admitted in the argument, and could not be denied, that, except in a certain case of *Willingale* v. *Maitland* (1), to which I am about to call further attention, no such right as this is known to the law. It cannot exist by custom; it cannot exist by grant, or so-called prescription, except by Crown grant: therefore, it is a right which cannot be supported; and if the right by itself is one which cannot be supported in law, it cannot entitle the Plaintiff to judgment merely because the Defendant does not deny the right. The Court is bound to give judgment according to law.

But then it is said, though the right is not known to the common law, it may be created by Act of Parliament, and the Judge is bound to assume, when not disputed by the pleadings, that it has been so created. The answer to that is, simply, that the Judge is theoretically bound to take judicial notice of all Acts of Parliament; that is, he is bound theoretically to know the contents of them, and to be aware that there is no such Act of Parliament. I say "theoretically," but practically the Judge requires attention to be called to the particular statute, and the clauses and sections of it that bear upon the matter in hand. But he is bound to take judicial notice of all Acts of Parliament; and even on demurrer, which is our strictest form of pleading, any Act of Parliament can be taken notice of by the Judge without being pleaded on either side.

Therefore, I am not at liberty to assume or presume that there is a public Act of Parliament conferring the right.

Then it is said, if there is not a public Act of Parliament the right can exist by Crown grant, and for that the case of *Willingale* v. *Maitland* is cited. Now, as far as I am aware, and probably

(1) Law Rep. 3 Eq. 103.

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no one has had more to do with these cases, or has looked into more authorities upon them than myself, there is no other case to be found at all like this: and the learned counsel who has argued the case on the part of the Plaintiff, and who is not only the author of a valuable work upon the subject, but has had considerable experience, as I know, as regards these cases, and probably knows as much about the authorities as any man living, has not been able to find any authority or case bearing upon the subject, except this case of *Willingale* v. *Maitland* (1). Therefore, I think I may, without presumption, say that no such case exists.

Being therefore driven to see what *Willingale* v. *Maitland* decided—without attempting for a moment to say that I can or that I should wish to overrule it, it being decided by my predecessor in the year 1866—I must see what it did decide. Now what it decided was this, that a Crown grant to the inhabitants of a parish to take certain *profits à prendre* out of a royal manor was valid; and that the effect of the grant was to incorporate the inhabitants for the purpose of enabling them to exercise the rights. That is all *Willingale* v. *Maitland* decided.

In the first place the case was decided on demurrer, and the bill alleged, "That Her Majesty Queen *Elizabeth*, being then lady of the manor of *Loughton*, by her royal charter granted to the inhabitants of the parish, that the labouring or poor people inhabiting the said parish, and having families, might at all times, commencing from the hour of 12 at night on the 11th day of November in every year, until the same hour on the 23rd day of April in the succeeding year, cut or lop the boughs and branches above the height of seven feet from the ground on the trees growing upon the waste lands of the said manor and parish (except on certain specified portions thereof)." Then I find this stated: "That the inhabitants had, since the charter, continually exercised the right so granted." This is all fiction, because if it had been a Crown grant it would have been found among the patent or close rolls, which are perfect from the time of Queen *Elizabeth*. However, it was not to be found, so in order to get rid of the difficulty the pleader chose to invent this fiction: "The said charter, which was formerly among the records of a Forest Court,

(1) Law Rep. 3 Eq. 103.

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called the Verderer's Court, had, together with such records, been long since lost or improperly disposed of, but there were divers documents and entries in the Court rolls, and other records relating to the manor, referring to, or containing evidence of, the charter, and the right thereby granted." That being so, the Judge dealing with the demurrer was bound to take those statements as true, though, of course, he and everybody else in Court knew that they were fictitious. Therefore he was dealing with a case in which an actual Crown grant by Queen *Elizabeth*, the then owner of the royal manor of *Loughton*, to the inhabitants of the parish was pleaded. Then, it being admitted that the right could not exist by custom, or by grant or prescription, in the inhabitants as individuals, the Plaintiff argued thus: "A grant by the Crown to the inhabitants of a place is valid, because, the Crown having the power of creating a corporation, the inhabitants are by the grant incorporated for the purpose of the grant." That was the argument for the Plaintiffs. Then there were certain old cases cited which went very far to support that proposition.

Now that was the argument adopted by the Court. Lord *Romilly* says (1): "A passage has been cited from *Sheppard's* Touchstone to the effect that a grant cannot be made to the inhabitants of a parish as such, for, although they may be all capable of taking individually as grantees, yet they cannot take under that general designation; but that passage applies solely to grants by private individuals. Several authorities were cited by Mr. *Joshua Williams*"—he was leading counsel for the Plaintiffs—"to establish the proposition, which I apprehend to be indisputable, that a grant by the Crown to a class of persons is good. The distinction between a grant by a private individual and a grant by the Crown, is this, that as the Crown has the power to create corporations, so, if it is necessary for the purpose of establishing the validity of a grant, the grantees will be treated as a corporation *quoad* the grant, which is not the case with a grant by a private individual, because a private individual has no power of creating a corporation."

The result therefore is that, according to that decision, and according to some ancient decisions, a grant by the Crown to the

(1) Law Rep. 3 Eq. 109.

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inhabitants of a parish for the purpose of taking a *profit à prendre* from land belonging to the Crown would be a valid creation of a corporation of the inhabitants of the parish. That being so, does it go any further? I admit that the Court in that case did not take the objection that if the inhabitants of the parish were a corporation, the corporation must sue. The objection does not seem to have been taken, though that is undoubted law. An individual corporator cannot sue a third person for injuring the property of the corporation. The point does not seem to have occurred to any one to take. In the present case, if the Plaintiff takes anything at all, he takes it under the doctrine of *Willingale* v. *Maitland* (1). So that he is a member of a corporation to which certain rights were granted *quâ* corporation. Whether such a corporation should sue under a corporate name, or whether, they not having a corporate name, the action should be by some on behalf of all, as being the corporation, is not for me now to decide. All I can say is the corporation must sue, and that an individual corporator cannot.

Therefore, in that way, I think, the present Plaintiff cannot get judgment; that is, he cannot bind all the inhabitants of the parish, for it would be deciding the extent of the right in their absence, which I think cannot be done. That appears to dispose of the main point argued on the part of the Plaintiff.

But I cannot help seeing that there are two other difficulties, and very singular ones, although here I must say there is more temptation to the Plaintiff to come into Court, for I do not find the points so distinctly raised on the pleadings as I think they might have been. The second objection is this, that although the Plaintiff is an inhabitant of the parish in a sense, he is not an inhabitant of the parish in the sense of being a member of this corporation. What the Defendants say is, "We do not admit that the Plaintiff, as the occupier of a house built upon land which forms part of the waste of the forest, or otherwise, is an inhabitant of the said parish entitled to exercise the said right." That means this: the house and land of the Plaintiff were on part of the waste of the forest; the land had been enclosed by the lord of the manor with the consent of the homage since August, 1851,

(1) Law Rep. 3 Eq. 103.

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and the buildings had been erected before August, 1871. Then the Plaintiff says, "At the time when the said enclosure was made, such enclosures were generally believed to be lawful, but such belief was mistaken, and the hereditaments so enclosed still remain in law subject to the rights of common formerly exercised thereon."

Now, if that is so, if the house itself is built upon land subject to rights of common, what the Defendants mean to allege—they do not put it as plainly as might be, but I am bound to find out what the pleadings mean—is this: inasmuch as the land upon which your house is erected is land itself subject to the right of common, your house is improperly erected and illegally erected; and the inhabitant of a house illegally erected and erected against the custom is not an inhabitant within the meaning of the custom.

That is perfectly intelligible, and I think raises an objection which appears to me, at present, not wishing finally to dispose of such a point as that, to be a valid objection. At present it seems to me that a grant to the inhabitants of a parish means the inhabitants of houses within the parish, and must be restricted to houses lawfully erected, and does not apply to houses which are illegally erected, and which may be levelled at any moment as having been erected in defiance of the law which regulates the rights of common; and that consequently the inhabitants of such houses do not get the benefit of the grant. That, at all events, appears to me now to be a valid objection.

Then there is a third objection on these pleadings to which I do not see the answer. The Plaintiff alleges a custom as to lopping the trees growing upon the waste lands, but the Defendants do not admit that custom in its entirety. They admit the custom except as to certain trees, locally called "spears," as to which they say the custom does not exist. I do not see the definition of "spears" anywhere. Then the Plaintiff alleges that the Defendants carried away all the trees, upwards of forty in number, growing upon part of the waste, about two acres in extent, thereby injuring his right of lopwood. The Defendants say they have cut down and carried away a few trees, but, as they believe, much less than forty in number; "and that such trees were growing upon

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a part of the waste where the inhabitants of the said parish of *Loughton* are entitled to use their said right of lopwood; but they deny that the "said *John Chilton* is an inhabitant entitled to use the said right; and they deny that they have thereby disturbed, and materially, or in fact injured, the right of lopwood belonging to the said inhabitants; and they do not admit that the said trees were trees which were subject to the said right of lopwood."

Now of course if they admitted that the custom was as to all trees, this allegation would have been inconsistent; but inasmuch as they have only admitted the custom as to trees other than spears, and as they say the trees cut down are not within the custom, it is an implied allegation that those trees are "spears," and is therefore quite consistent with their admission of the custom, or right, or whatever it may be called, which the Plaintiff claims.

I should say upon that ground also, it is impossible to give judgment against the Defendants upon these pleadings.

The motion will therefore be dismissed, with costs.

Solicitors: *C. J. Rawlings; Horne & Hunter*, agents for *T. J. Nelson*, City Solicitor.

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[1875 A. 35.]

Charity—Founder's Gift to "Poor Kindred"—Meaning of "Poor" or "Poorest" —Least Wealthy of a Wealthy Class excluded—Charity Scheme—Cy-près.

To constitute a gift to the "poor" or "poorest" of a specified class of persons a charitable gift, it must be construed as a gift to the actually poor, and not to the least wealthy of a wealthy class.

Dictum of *Wickens*, V.C., in *Gillam* v. *Taylor* (1) disapproved of.

Isaac v. *Defriez* (2) explained.

A testator, who died in 1628, gave, "for the use and benefit of the poorest of his kindred, such as were not able to work for their living, viz., sick, aged, and impotent persons, and such as could not maintain their own charge,"

(1) Law Rep. 16 Eq. 581. (2) Amb. 595.

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the sum of £1000, to be laid out in the purchase of lands of the value of £60 a year at least, the rents and profits thereof to be distributed yearly among them by trustees; and the testator declared his meaning to be that in distributing his estate and goods "to the poor charitable uses," those of his kindred which were poor, aged, impotent, or any other way unable to help themselves should be chiefly preferred.

After the testator's death the £1000 legacy was laid out by his trustees in the purchase of a freehold estate, which they let on building leases under powers contained in an Act passed in 1772.

In 1875, in consequence of the rapidly-increasing income of the estate and the large number of the testator's kindred, of whom some only could be considered proper objects of charity, a scheme was proposed for the future regulation of the charity created by the will, whereupon the question arose whether any and what portion of the income of the charity property could or ought to be appropriated to the benefit of any persons not being kindred of the founder:—

Held, that the testator's gift must be read as a gift to charitable objects, such objects being persons necessitous and disabled according to the definition in his will, but with a prior charge in favour of such of his kindred as should be necessitous and disabled; and therefore that, subject to this prior charge, the income of the estate was applicable for the benefit of charitable objects other than kindred of the testator.

Statement.

ADJOURNED SUMMONS.

The action was instituted in March, 1875, with the object of having a scheme settled by the Court for the regulation of a charity, commonly known as "*Smith's (Poor Kin) Charity*," created by the will, made in 1627, of *Henry Smith*, a citizen and alderman of *London*, who died in 1628.

The charity originated in two bequests in the will, of which one was as follows:—

"I give and devise for the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge, the sum of £1000; which said sum of £1000 my will and meaning is shall be laid forth and bestowed in the purchase of lands of inheritance of the value of threescore pounds per annum at the least, and the rents and profits thereof to be paid yearly unto them, and to be distributed amongst them by my said executors and their heirs, and by the Lord Mayor of *London* and the sheriffs for the time being, as most need shall be from time to time: And my will and meaning is, that in the bestowing and distributing of my estate and goods to the poor charitable uses,

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which is, according to my intent and desire, those of my kindred which are poor, aged, impotent, or any other way unable to help themselves, shall be chiefly preferred and respected."

At the foot of the will there was a memorandum that "the testator being asked which of his kindred he meant and intended in and by those words, the poorest of his kindred, &c., in the legacy of £1000 bequeathed in his will to be laid out and bestowed in the purchase of lands of inheritance of the value of £60 per annum, and the rents and profits to be paid yearly unto them, &c., made answer that his meaning was thereby the poorest of his sisters' children, and their children successively, or like in effect."

Shortly after the testator's death his legacy of £1000 was, together with the other charitable legacy, laid out in the purchase of a freehold estate called "*The Kensington Estate*," situate in the parishes of *Kensington*, *Chelsea*, and *St. Martin-in-the-Fields*, in the county of *Middlesex*, which estate had since continued to be and was now vested in and under the management of the trustees of the charity.

Under the powers of an Act passed for the purpose in 1772, the trustees from time to time granted building leases of various portions of the charity estate.

This action had become necessary on account of the rapidly increasing income of the Charity, and the large number of persons, about 700, claiming to be the testator's "kindred," only some of whom were possessed of the qualifications prescribed by the will, of being sick, aged, and impotent persons, and such as were not able to work for their living.

In July, 1875, a decree was made in the action directing that a scheme for the future regulation and management of the Charity should be settled by the Judge; and also that an inquiry should be made into the particulars of the property of the Charity.

On a draft scheme being carried into Chambers by the Attorney-General, a question arose, among others, whether any and what portion of the income of that part of the estate representing the £1000 legacy above mentioned ought to be appropriated to the benefit of any persons not being kindred of the founder.

The question was raised by a summons taken out by the At-

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Argument.

torney-General to proceed with the settlement of a scheme and with the inquiry directed by the decree.

Davey, Q.C., and *Vaughan Hawkins*, for the Attorney-General:—

The gift may, we submit, be read either as a gift to the testator's poor kindred, or as a gift to poor persons generally with a preference in favour of the kindred. It is immaterial which construction is adopted: poverty was clearly the leading idea in the testator's mind. In the one case, by the application of the *cy-près* doctrine, the surplus income, after providing for the kindred answering the testator's description as persons unable to work for their living, &c., should go to poor persons generally who answer the testator's description but are not of his kindred; and in the other case disabled and necessitous poor persons in general will participate under the will, independently of the *cy-près* doctrine.

Our view is that the primary objects of the testator's bounty are his poor kindred, and that if the income is more than sufficient for the relief of poor kindred, the surplus should go, preferably, to "poor" rather than to "kindred." Poverty being the main object the testator had in view, the proper application of the surplus, after providing for kindred who are actually poor, is to the relief of poverty outside the kin, rather than for the benefit of kin who, though poor by comparison with other members of the class, may nevertheless really be in affluent circumstances, and not proper objects of charity.

Bagshawe, Q.C., and *W. Barber*, for the Defendants, the trustees of the Charity:—

We submit that the Charity should not necessarily be limited to paupers, but might be very properly extended to the education or advancement of the children of poor persons, treating the testator's poor kindred as primary objects.

Chitty, Q.C., and *Macnaghten*, for the "Committee of Kindred," who had obtained leave to attend:—

We submit that, upon the construction of the will, the income is distributable at the discretion of the trustees among the poorest of the testator's kindred; not necessarily poor in the abstract

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sense, but among such of the kindred as the trustees may consider to be the poorest. Supposing some of the kindred had £20,000 a year, and every one of the others £10,000 a year, it seems that would not prevent this being a charitable gift in favour of the latter, they being literally the "poorest." This was so laid down by Vice-Chancellor *Wickens* in *Gillam* v. *Taylor* (1), on, as he considered, the authority of *Isaac* v. *Defriez* (2).

Argument.

[JESSEL, M.R. :—A gift which is not a gift to the poor, that is, the actually poor, is not a charity. How, for instance, could a gift to the "poorest of the Dukes of *Northumberland*" be a charity? I am surprised at Vice-Chancellor *Wickens'* *dictum*, and I cannot follow it. He seems to have overlooked the actual decision in *Isaac* v. *Defriez*.]

At all events, if your Lordship should read this as a gift for poor persons, taking "poor" to mean necessitous or destitute, there seems to be no good reason why the views of the trustees should not be adopted, and the benefits of the Charity extended to the education or advancement of the children of such poor persons, preference being given to the testator's kindred.

Vaughan Hawkins, in reply.

JESSEL, M.R. :—

Judgment.

I think if it had not been for the mistake which a very learned Vice-Chancellor—whom we all regret—appears to have made, this case would never have come into Court. The gift in the will is "for the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge."

Now "poorest" evidently means "very poor." I do not mean to say the word "poorest" is accurately used, but that is the meaning of it. When the testator talks of "sick, aged, and impotent persons," he means sick, aged, and impotent, so as to incapacitate them from earning their living. That is what he means. He does not mean a man with £10,000 a year who happens to be sick, or aged, or impotent. The object he intends to benefit is to be a proper object of charity.

(1) Law Rep. 16 Eq. 581. (2) Amb. 595.

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Judgment.

Upon that there really is authority; and the singular part of the matter is, that the authority which I am now going to quote was unfortunately—I cannot say misunderstood, because I cannot believe that the late Vice-Chancellor *Wickens* misunderstood it—but probably overlooked by him: I think by some accident he must have trusted to memory instead of looking at the authority. The old case of *Isaac* v. *Defriez* (1) was this: *Nathan Simpson*, by his will, after his sister's death gave property to his own and his then present wife's "poorest relations," to be distributed and paid to them proportionally, share and share alike, at the discretion of his executors. The bill was filed by the executors or trustees against the Attorney-General and some of the poor relations. It was decided to be a charity—but a charity for whom? The decree, as stated in the note to the report, was this: it declared that the charity ought to be established, and directed accounts; and any of the parties were to be at liberty to lay a scheme before the Master for carrying the charity into execution; "an inquiry was also directed whether the Defendants, or either of them, were poor relations of the testator; and any other poor relations of testator or his wife were to be at liberty to go before the Master to claim such benefit as they may be entitled to under the will."

That is, the Court read the word "poorest" to mean "poor" or "very poor." The Court did not mean poorest in the sense of being least wealthy of a number of wealthy people. In that sense, no doubt, the man who had £10,000 a year would be the poorest of a dozen persons each of whom had more than £10,000 a year; but what the Court meant was actually poor, treating the word "poorest" as a word of intensity, meaning at least "very poor."

In the *Attorney-General* v. *Price* (2), before Sir *William Grant*, then Master of the Rolls, the word was "poor." The gift was to a man and his heirs, to "divide and distribute according to his and their discretion amongst my poor kinsmen and kinswomen;" and the Master of the Rolls said, "This appears to me to be in the nature of a charitable bequest, particularly upon the case of *Isaac* v. *Defriez*, which is both imperfectly and erroneously reported:" and then in a note to that case there is a correct account given of the decree in *Isaac* v. *Defriez*, in substantially the same terms as

(1) Amb. 595. (2) 17 Ves. 371, 373.

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the account given in the note to *Ambler's* report, which I read just now.

The inquiry in this case of the *Attorney-General* v. *Price* (1) was, "whether the Plaintiffs are poor relations of the testator; and whether there are any others of his poor relations who dwell within the county of *Brecon*." What the Master of the Rolls went on to say regarding *Isaac* v. *Defriez* (2) was this: "This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance in favour of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations."

In *Gillam* v. *Taylor* (3), the case to which I first referred, the question was one of construction. The will there directed interest from time to time to be given to such of the lineal descendants of a man as they might severally need. That was construed by the Vice-Chancellor to mean such of them as should be needy. That is a question of construction. But I must read the gift as a gift "to such needy lineal descendants of *R. W.* from time to time as they might require;" and the trustees were to make provision for ensuring the continuance of the trust at their decease.

The real point decided was, that that was a charitable gift, and that the gift was not to go to those who were relatives at the death; that is, that there was not to be an immediate distribution among persons beneficially, but a distribution among charitable objects, the words "in need" being read to mean "needy."

Then the Vice-Chancellor *Wickens* says this (4): "I have, though unwillingly, come to the conclusion that I am bound by the cases of the *Attorney-General* v. *Price* and *Isaac* v. *Defriez*, and that I must treat this as a charitable gift;" that is, reading "in need" to mean "needy," the case fell exactly within those decisions. Then he refers to what Sir *William Grant* says in *Attorney-General* v. *Price*; and then he goes on to say this: "No doubt the word 'poor' occurred in that case. The language is: 'It is amongst my poor kinsmen and kinswomen, and amongst their offspring and issue. And in the case of *Isaac* v. *Defriez* the testator's bequest was unto his own and his wife's poorest relations, at the discretion of the

(1) 17 Ves. 371.
(2) Amb. 595.
(3) Law Rep. 16 Eq. 581.
(4) Ibid. 584.

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executors; not abstractedly poor, but to be divided equally amongst such persons as the executors considered to be the poorest relations. Every one of them might have £10,000 a year, but some might have £20,000 a year, and those who had £10,000 a year would take it. Still it was held to be a charity."

Now, that is an entire mistake of the Vice-Chancellor's. The decree in *Isaac* v. *Defriez* (1) was only for poor relations, and the decree would not have comprised a person who had £10,000 a year, nor did anybody ever decide that such a gift as that would be charitable, for the moment you hold that a person who has £10,000 a year can take under such a gift, you would hold at the same time it was not a charity. No one can take under a charitable gift unless it is within the statute of *Elizabeth* as interpreted by the Courts. I need not say that the words of the statute have received a very liberal interpretation, but no Court has ever held that a man who had £10,000 a year was an object of charity within the purview of that statute.

How the Vice-Chancellor came to make such a singular mistake, supposing he is correctly reported, I cannot tell; because there was nobody on the bench or off it who was more familiar with charity cases than he was.

I am bound to make these observations, because *Gillam* v. *Taylor* (2) is reported, and has been cited to me as an authority. It is no authority at all, so far as that *dictum* is concerned, and is totally opposed to the whole theory of charity administration in this Court.

That being so, I will now proceed to consider what is the testator's will, and what ought to be done with the surplus, if any, of the income of this estate, after providing for what I consider to be the true objects of the charity.

The will is plain enough to my mind. [His Lordship then read the bequest above stated, and continued:—]

It seems to me that what the testator means is that all his poor kindred who are unable to get a living, unable to work for their living because they are sick, aged, or impotent persons, or cannot otherwise maintain themselves, are to be provided for. That is the first charge.

(1) Amb. 595. (2) Law Rep. 16 Eq. 581.

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But, subject to that, I think the testator does shew, under the word "preferred," an intention—reading the words "to the poor charitable uses" to mean "to charitable uses for the poor"—that the whole of the property should be devoted to charitable uses for the poor, subject to the direction as to preference which I have mentioned. That, I think, is the meaning of the will.

It appears to me, therefore, that the first trust of the income of that portion of the estate representing the original £1000 legacy is for the poor kindred of the testator—poor according to the definition in the will, and no other; that is, people who are not able to work for their living, or by reason of their being sick, aged, or impotent, or, for any other reason, unable to keep themselves. That is the meaning of "help themselves." That is the class of persons to be provided for, and if there is more than sufficient to provide for them, the surplus must go to objects of charity to be pointed out by the Court.

The result, therefore, is that there will be a declaration that the income of this portion of the estate is applicable, primarily, and so far as required for the purpose, for the relief of poor persons, being kindred of the testator, who, from age, sickness, infirmity, or otherwise, are incapable of maintaining themselves; and that, subject to this, such income is applicable for the benefit of charitable objects other than kindred of the testator. The costs will be costs in the action.

C. A. Feb. 11, 1878. The Committee of Kindred appealed only upon a point connected with the other charitable bequest, which does not call for a report.

Solicitors: *Clabon; Bray & Co; Grover & Humphreys.*

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V.-C. M.
1878
Feb. 14.

In re HODGES, DAVEY *v.* WARD.

[1875 H. 50a.]

Maintenance and Education—Discretion of Trustees—Control of the Court—Past and Future Maintenance.

A testator gave a legacy of £3000 to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one:—

Held, that the Court had power to control the discretion of the trustees in the allowance to be made for children; and the Court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance.

Statement.

THIS was a motion to vary an order made in Chambers directing that the dividends accruing due during the minority of the infant Plaintiffs, *Catherine*, *Teresa*, and *Mary Davey*, on £3612 5*s.* 6*d.* £3 per Cent. Annuities now in Court to the credit of this action be from time to time paid to *Edward Charles Davey* for the future maintenance and education of the infant Plaintiffs; and that in lieu thereof a direction might be inserted in the order to the effect that such dividends were to be accumulated for the benefit of the infant Plaintiffs until the youngest or youngest survivor of them attained the age of twenty-one years, as directed by the will of the testator, *Richard Hodges*; and that the costs might be paid by the said *Edward Charles Davey*.

Richard Hodges, by his will, dated the 17th of December, 1870, appointed *Richard Ward*, *J. Edward Reeve*, and *Sydney Hodges* executors of his will. The testator devised and bequeathed the residue of his real and personal estate to his trustees upon trust to convert the same into money; and as to the sum of £3000, he directed them to stand possessed thereof, and of the stocks, funds, and securities upon which the same should from time to time be invested, and the accumulations thereof, until the youngest

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or youngest survivor of the three daughters of *Sarah Davey*, deceased, the late wife of *Edward Charles Davey*, namely, *Catherine Mary Davey*, *Teresa Mary Davey*, and *Mary Ellen Davey*, should attain the age of twenty-one years; and immediately after the youngest or the youngest survivor of such daughters should attain that age, then upon trust to pay, transfer, and divide the same sum of £3000, or the stocks, funds, or securities upon which the same should for the time being be invested, and all accumulations thereof, unto or among the said three daughters of the said *Sarah Davey*, or the survivors or survivor of them, share and share alike, or solely, as the case might be; and in case all the said three daughters should depart this life before the youngest of them, or the youngest survivor of them, should attain the age of twenty-one years, then upon trust to transfer and divide the said sum and all accumulations thereof between *Richard Ward* and *Mary Ann Reeve* equally, share and share alike, absolutely and beneficially. And the will contained the following clause:—

"And I direct that if any person or persons for the time being actually or presumptively entitled to all or any part or share of and in the several legacies, sum and sums of money, moiety or moieties, and trust moneys hereinbefore respectively directed to be invested as aforesaid, or any or either of them, or the dividends, interest, or proceeds therefrom respectively arising, or the accumulations thereof, either under or by virtue of the trusts hereinbefore contained, or of any direction, appointment, gift, or bequest made under or in exercise of the said trusts, or any or either of them, shall (after the decease of the person or persons respectively entitled to the life interest in the said legacies, sum or sums of money, moiety or moieties, or trust moneys, or any part or share thereof, if there be any such person or persons), if a male, be under the age of twenty-one years, and if a female, be under that age and unmarried, my said trustees or trustee for the time being shall pay and apply the whole, or such part as they or he the said trustees or trustee for the time being shall think fit of the annual produce and income of the legacy, sum of money, moiety or moieties, dividends, interest, or proceeds, or accumulations, or part or share to which such person shall for the time being be actually or presumptively entitled for or towards his or her main-

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tenance, education, and advancement in the world, until such person, being a male, shall attain the age of twenty-one years, or being a female, shall attain that age or be married, and shall, during such minority or minority and discoverture, as the case may be, accumulate all the surplus, if any, of the said annual produce and income in the way of compound interest by investing the same and all the resulting produce and income thereof from time to time in and upon any of the stocks, funds, securities, or investments hereinbefore authorized, and add such accumulations to the principal or capital of the fund or share from which the same shall have arisen, with power nevertheless for my said trustees or trustee for the time being to resort to any such accumulations for the maintenance, education, or advancement in the world of the person or persons for the time being presumptively or actually entitled thereto."

The testator died in 1873, and the £3000 legacy was paid into Court by the trustees, and invested in £3612 5*s.* 6*d.* £3 per Cent. Annuities.

There was also a summons by *Edward Charles Davey*, the father of the three infant children, so that out of the sum of £3612 5*s.* 6*d.* standing to the credit of the cause, and £503 12*s.*, the amount of dividends accrued, a sum of £463 might be allowed him for the past maintenance of his children from the 25th of July, 1873, to the 25th of January, 1878, less the sum of £90 advanced by the trustees for the maintenance of the infants.

Edward Charles Davey, by his affidavit in support of the application, stated that the trustees had allowed him a sum of £60 a year for the first year and a half after the investment of the legacy of £3000 to the infant children, but after the institution of this action the trustees had refused to continue that allowance. He further stated that he had continued to maintain and educate the three children at the *Ursuline Convent* at a cost of £150 per annum, to defray which he had borrowed from his sister, lately deceased, the sum of £350, which her husband was now pressing him to repay, and he had had a gift of £50 from his mother, and he had mortgaged for £63 his life policy in an assurance company. His income did not exceed £200 per annum, and he had five other children by his second marriage, and was quite unable to maintain

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and educate his three daughters, the Plaintiffs in this suit, from his own resources; he therefore submitted that the whole of their income should be allowed him for the purpose.

Bristowe, Q.C., and *Stallard*, for the trustees:—

By the will of the testator the trustees have the entire discretion of allowing what sum they think necessary for the maintenance and education of the three children. The Court has no power to override this discretion if it is fairly and properly exercised. This principle was laid down in *Costabadie* v. *Costabadie* (1), where the Court held that if a discretionary power is vested in trustees, that discretion will not be interfered with, if it be fairly and honestly exercised. No doubt the Court has a right to inquire into the circumstances to ascertain whether the trustees are acting fairly and honestly, but there is no evidence in this case to shew that the trustees are not exercising their discretion to the best of their ability. The evident intention of the testator by this will was to have the dividends accumulated, for which he has given minute directions, and his object clearly was to augment the fund, so that when the children attained the age of twenty-one they might have a handsome amount which would be of real use to them.

The clause for maintenance and education is added in a later part of the will, and is applicable to all the various legacies given by the testator, but it is not because the trustees have that power that they should be bound to exercise it when they fairly and honestly consider that it will be more for the advantage of the children to have an accumulated fund for their future advancement in the world. Moreover in this case the three children are not the only persons interested in the fund, which is given over in case they die under twenty-one, and it was held by the Master of the Rolls in *Fairman* v. *Green* (2), that maintenance for children would not be allowed out of legacies given over in case of their deaths under twenty-one, without the consent of the legatee over.

J. Pearson, Q.C., and *Freeling*, for the father, *Edward Charles Davey*:—

When a discretion is given to trustees to allow maintenance

(1) 6 Hare, 410. (2) 10 Ves. 45.

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and education, the Court has power to interfere and control that discretion. It is for the Court to decide whether the trustees are exercising their power discreetly or not. The Court will no doubt pay every attention to the suggestion of the trustees, but the interests of the children who are wards of the Court must be the first object of consideration. The only cases in which the trustees will not be interfered with is where they are given an uncontrolable discretion, or where there is a certain sum fixed for maintenance which is not to be exceeded. The father of these children is a man of small income, which he states to be under £200 per annum, and there is no evidence to disprove it. He cannot, therefore, provide adequately for all his family, and it is far better that these three children should have a good education provided for them out of their own income, than that they should grow up without proper education, though they may have a small increase of income at a future period.

Then as to the second application, which is in the shape of an adjourned summons by the father to be allowed past maintenance, this follows as a matter of course if the Court should be of opinion that the whole of the income or any larger part of it than he has hitherto received, should be paid to him. For a year and a half the trustees allowed Mr. *Davey* the sum of £60 per annum, but after his application for an increased allowance he has received nothing, still he has gone on with the education of the children, and has been obliged to borrow money for the purpose. All we now ask is that the sum which he has borrowed, and which he is unable to repay, may be allowed him.

[They referred to *Simpson* on Infants (1).]

Bristowe, in reply:—

It is too late now for Mr. *Davey* to apply for past maintenance. The application should have been made in Chambers when future maintenance was allowed. Under any circumstances he ought not to have the whole income of the children.

Judgment.

MALINS, V.C.:—

These are two applications, not relating to any very large sums

(1) Page, 287.

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of money, but applications involving principles of this Court of the highest importance. If I were to accede to the application of Mr. *Bristowe* I should be acting on principles which would paralyze the discretion of myself and the other Judges of this Court to an extent which, in my opinion, would be most prejudicial to the best interests of society.

I have before me this case: Under the will of Mr. *R. Hodges*, who died in 1869, there was a legacy of £3000 left to three children; and for the administration of the estate of which they are legatees, a bill has been filed, and they are now regularly wards of the Court. There was no preceding life estate, for the mother was dead when the will was made, but the legacy of £3000 was given to them, or the survivors or survivor of them, who should attain the age of twenty-one years, and if they all three died under the age of twenty-one years, there is a gift over, and under that gift over one of the trustees is interested. When the matter was before me in Chambers, I asked the trustees, or at least the representative of the trustees, whether it was on account of the personal interest of one of them that he objected to the order I proposed to make for the maintenance of these children, for I said, If your personal interest is concerned I will indemnify you against any loss by effecting a small insurance—and a very small sum will pay for it, because the children are now of the respective ages of eighteen, seventeen, and fourteen years, and the gift over cannot take effect if any one of those three children attain the age of twenty-one. Not only are they the absolute legatees of the £3000, so that nobody can possibly have an interest in it except they all three die under the age of twenty-one, but there is also in the will an express direction to the trustees or trustee for the time being to pay and apply the whole or such parts as they or he shall think fit of the annual produce and income of the legacy for their maintenance and education; so that the trustees have the most complete power of maintenance to the extent of the whole or any part of the fund.

Now, these children being my wards, some short time ago—not for the first, but for the second time—the matter was brought before me on further consideration, and an application was made that I should allow to the father the whole of the income for the

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maintenance and education of the children. I then applied the rules which are always acted upon by myself and I believe by every Judge of this Court. The only thing I have to look to is the interest of the wards, and what is best for them. First of all, I considered it desirable that they should live with their father. He is a wine merchant, in a small way of business, with a very limited income. He has married again—there were three children by his first marriage—and by his second marriage he already has five children. I have evidence before me that his income does not exceed £200 a year. Considering, therefore, that he had to support five children, who had nothing but his labour and his business to depend upon, and considering that these three children have an income of their own of more than £100 a year, I found that the trustees, in the exercise of their discretion, thought fit to limit the allowance to £60 a year, and what I had to determine was, whether it was more for the benefit of these infants that £40 a year should be accumulated until they had attained twenty-one, which would not amount to above £150 or £200, or whether it was better that the father, who is incapable out of his own resources of educating them, should have this additional £40 a year for that purpose. The trustees certainly in Chambers exhibited great obstinacy about it; they were not there personally, and I do them the credit of believing that if they had been there and heard my views, I should have had no further difficulty; but the managing clerk of the agents of a firm at *Wolverhampton*, acting upon written instructions, was a very strenuous opponent to the exercise of my discretion to the extent of the extra £40 a year. I am now still more surprised than I was at Chambers, because I find Mr. *Pearson* in possession of a letter, in which the trustees, taking a very reasonable view at that time, say "the children are wards of Court, bring it before the Vice-Chancellor, and if the Vice-Chancellor thinks fit to allow the whole we are satisfied." Why they altered that view, unless they or the solicitor had some personal quarrel with the father, I cannot tell; but, to my mind, it is incomprehensible that any trustee should have thought it worth while to offer such an opposition, and still more incomprehensible that when the Court in Chambers, as it does in all these matters, has carefully considered it, as I most undoubtedly did, and gave my

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reasons, he should have thought it worth while to instruct counsel to bring such a case as this before the Court.

Now, on what principle is it argued that I cannot do this? It is said that the trustees have the discretion, and therefore that the Court has none. I beg to say I act upon the principle, and until I am overruled I shall continue to act on the principle, that I have a controlling power over all trustees. For instance, if trustees should consent to a marriage of one of my wards, and I thought it an improper marriage, I should control their discretion by refusing the marriage. If they objected to a marriage, and I thought the objection unsustainable, I should overrule the objection and allow it, if I thought the marriage a desirable one, as the Vice-Chancellor *Stuart* did in a very remarkable case of a young lady who lived near *Brighton*, who had a very large fortune; the Vice-Chancellor *Stuart* refused to allow the marriage; the Court of Appeal did afterwards allow the marriage, but it went on the principle that this Court will not be fettered by the exercise of the discretion of the trustees, but will control that discretion if it thinks fit. I quite agree with what Mr. *Pearson* has stated, that if the amount of maintenance is limited, and it is provided that such maintenance shall not exceed a certain amount, then the Court can do nothing, and that is the principle I acted upon in *Lord Nigel Kennedy's* case, and if, as Mr. *Pearson* submitted, the discretion of the trustees is to be absolute and uncontrollable, the Court will not interfere; but where the will says that the whole or any party shall be applied according to the discretion of the trustees, the Court may allow more if it thinks fit. If the discretion of the trustees is, in the opinion of the Court, improperly exercised, the Court will control that improper exercise.

In order to shew that that view is wrong, Mr. *Bristowe* refers me to the case of *Costabadie* v. *Costabadie*, where Sir *J. Wigram* says (1): "If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the Court should deprive the party of that discretionary power, where a proper and honest discretion is exercised." He says it must be either improper or dishonest, and if it is so, then the Court will

(1) 6 Hare, 414.

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interfere. Then he says further on: "If the relief were not given in that manner, there might at each moment be a new case arising, and with it a new suit. I am not aware, however, that the Court has ever denied the right of a testator to give a discretion, or deprived the trustee of it as a matter of course." Therefore the view I have always acted upon, which, I think, is the proper view, and which I shall continue to act upon, is this, that where the trustee acts in the exercise of his discretion, it is incumbent upon the Court to pay every respect to that exercise, but it must consider whether it is properly done; adopting the language of Sir *J. Wigram*, which Mr. *Bristowe* cites to me, the Court must consider whether it is an honest and proper discretion. Paying every respect, as I always do, and as I am bound to do, to the discretion of the trustees, I still must exercise my own judgment, and take that course for my wards which I think is most for their benefit.

Acting upon that principle, I do not think the exercise of the discretion before me proper. I do not think it to the interests of the wards that they should be left uneducated, or that the father should incur debt for the purpose of their education when they have the means of maintaining themselves, and therefore, in the proper exercise of my discretion, which I am perfectly satisfied now, as I was then, I discreetly exercised, I did order, not according to the dictates of the trustees who attempted to dictate to me £60 a year, but the whole income of £100 a year for the maintenance of these infants. That part of my order will stand, and I therefore refuse the application of the trustees.

I did warn them that if they brought this question to be argued in Court I should probably make them pay the costs, but as Mr. *Pearson* does not ask for costs, I will, to that extent, moderate what I said. The trustees will have the costs out of the estate or out of the accumulated fund. This disposes of the first part of the application.

The next thing is a summons taken out in Chambers for the allowance of past maintenance. The great objection made by Mr. *Bristowe* to that is, that when the application was made to me in Chambers for future maintenance no application was made for past maintenance; that is certainly true, though I believe,

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from all I hear, it arose from a misunderstanding. It was not expressly asked from me personally, and it seems to have been supposed by the other side that I ordered the past maintenance. When the order went before the Chief Clerk, he, considering that I had not made an order for the past maintenance, struck out that part of the order which gives past maintenance. Therefore the thing was not done; but I am not aware in these matters, where the well-being of the wards is the only thing to be considered, that it is at any time too late to make the application which has been made before me for their benefit.

Applying the same principles, I have before me evidence that this gentleman is without the means of educating these children. He is a respectable man. I should never allow any maintenance for a child to a father unless I was satisfied that he was going to spend it properly, but being satisfied in this case that he is a respectable and well-conducted man I make the order that he shall have this maintenance. It is now stated that for the purpose of educating his children for the time past he has sent them to the *Ursuline Convent*, they being Roman Catholics, and that he has borrowed money and has got into debt, and that he has not the means of paying the debt. Therefore I have this choice, whether it will be more for the well-being of these children that I should save for them until they come of age this £400, which will be about £130 each, and allow them to live in the house of their father as an insolvent man surrounded with difficulties, or whether it would be better that they should live with their father as a solvent man able to meet his engagements. I am clearly of opinion that, this debt having been incurred for the benefit of the children, it having been spent for their education at the time they had the income, which was ever since 1873, I am bound on every principle I have adverted to, to say he must have the money for the past maintenance to enable him to discharge those debts which he has incurred for the purpose of educating his children, and I cannot in the slightest degree accede to the technical objection that it is too late to do that because it was not asked some two or three months ago. I am satisfied it is on the whole for the benefit of the wards that the father should have the

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money, and that it is my duty to give it, and I cannot accede to the objection on the part of the trustees.

The result will be, that the father will have the whole of the income for the future maintenance and education, and that he will have past maintenance to discharge himself of the debt which he has incurred. It will not be necessary to fix the exact amount, but I do not see that the sum named is at all inordinate.

The costs of both applications, as between solicitor and client, must be paid out of the accumulated fund, and not out of the testator's general estate, because these legacies have been appropriated, and after payment of costs the father will have the rest of the fund.

Solicitors for Trustees: *Saunders, Hawksford, & Bennett.*
Solicitors for *E. C. Davey: Torr & Co.*

V.-C. M. 1878 *Feb.* 21.

NEWCOMEN *v.* COULSON.

[1876 N. 97.]

Practice—Discontinuance of Action—Undertaking as to Damages—Rules of Court, 1875, *Order* XXIII.

A Plaintiff who had given an undertaking as to damages discontinued his action:—

Held, that the Court would nevertheless direct a reference as to damages.

Statement.

MOTION.

The question arising on this motion was whether a Plaintiff who discontinues his action under Rules of Court, 1875, Order XXIII., can do so without paying damages to a Defendant to which he was otherwise liable; the rule only providing for payment of the Defendant's costs of action.

The Plaintiff brought the action to prevent the Defendants, 1, from using a road; 2, from building a bridge. On giving the usual undertaking as to damages, the Plaintiff obtained an interim injunction against the Defendant to restrain him from building the bridge, but failed as to the road.

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The Plaintiff discontinued his action in March, 1877, and this motion was now brought by the Defendants for damages according to the undertaking. The notice of motion was given on the 9th of February, 1878.

Argument.

Glasse, Q.C., and *W. W. Karslake*, for the motion, relied on *Newby* v. *Harrison* (1).

[MALINS, V.C.:—In that case, I think, as damages were not asked for at the time, I should not have given them afterwards; but here the Plaintiff has prevented the Defendant from asking at the hearing, by discontinuing the action.]

Higgins, Q.C., and *Procter*, *contrà*:—

The jurisdiction has gone with the discontinuance of the action: *Bingley* v. *Marshall* (2). Here there is no judgment of the Court on the record, as there was in *Newby* v. *Harrison*, to give jurisdiction. No appreciable damage can have arisen from the order. The Court has a discretion under the undertaking, and is not bound to allow what might be legal damages.

Glasse, in reply.

Judgment.

MALINS, V.C.:—

I cannot accede to Mr. *Higgins's* argument, that a Plaintiff can deprive a Defendant of his right to damages under the Plaintiff's undertaking by discontinuing his action. If this suit had come to a hearing I should have considered that the proper time for the Defendants to claim damages under the Plaintiff's undertaking, and if they had not done so, I should have considered their right waived. But it was otherwise decided in *Newby* v. *Harrison*. Here the Plaintiff has deprived the Defendants of their proper opportunity to ask for damages, but it would be a most dangerous doctrine to hold that he can thus evade his liability. I was at first struck with the delay on the part of the Defendants, but there was a delay of four months in *Newby* v. *Harrison*, which was not considered too much, and perhaps a year may not be considered too long to

(1) 3 D. F. & J. 287. (2) 11 W. R. 1018.

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wait. Here there has been a delay of eleven months, during which negotiation probably went on. There must be a reference as to damages in the ordinary way.

Solicitors: *Bower & Cotton*, agents for *Dodds & Co., Stockton*; *Crowdy & Son*, agents for *John Trotter, Stockton.*

V.-C. M. 1878 Feb. 28.

BOLTON *v.* LONDON SCHOOL BOARD.

[1878 B. 98.]

Vendor and Purchaser Act, 1874 (37 & 38 *Vict.* c. 78)—*Recitals in Deeds Twenty Years old—Practice—Injunction till further Order.*

A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase-money, but the purchaser was not to be considered as accepting the vendor's title:—

Held, that this clause had the same operation as the 85th section of the *Lands Clauses Act* (8 Vict. c. 18), and the purchaser was entitled, upon depositing the purchase-money, not only to take possession, but to pull down the house, that being the object for which the purchase was effected.

Under the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required.

Where an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period except with the leave of the Court.

Statement.

ON the 25th of February, 1878, an injunction was granted till over the following motion day, or until further order, to restrain the Defendants, the School Board for *London*, from pulling down or otherwise injuring certain houses therein specified situate in *Buckingham Terrace* and *Buckingham Mews, Bayswater*, or any part thereof.

A motion was now made on behalf of the Plaintiffs that the interim injunction should be continued until the hearing of the action.

A motion was also made on behalf of the Defendants to discharge the interim injunction.

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The Plaintiffs were trustees for sale, under the will of *Thomas Bolton*, of the houses comprised in the order for an injunction, and the School Board, being desirous of acquiring the houses for the purpose of building a school-house, proceeded under the compulsory powers of their Act, and served a notice to treat upon the Plaintiffs, which, after some correspondence, resulted in an agreement being executed on the 19th of December, 1877, between the Plaintiffs of the one part and *George H. Croad*, the clerk of the School Board, of the other part, by which the Plaintiffs contracted to sell the property to the School Board for the sum of £4300. The 5th clause of that agreement was in the following terms:—

"The board shall be entitled to take immediate possession of the said hereditaments subject to the said leases upon depositing at their own risk at the *Union Bank of London, Charing Cross*, in the joint names of the vendors and the said *George H. Croad*, the said purchase-money, paying to the vendors interest thereon at the rate of £5 per cent. per annum from the day of taking possession, and the board shall be entitled to interest paid by the bank, but shall not be considered as accepting the vendor's title."

In pursuance of that clause in the agreement the purchase-money was deposited in the *Union Bank* in the names of the Plaintiffs and *George H. Croad*, and the School Board then took possession of the property, and commenced pulling down the houses for the purpose of erecting their own buildings.

The Plaintiffs thereupon complained that the School Board were not justified in commencing their building operations until the title had been accepted and the purchase-money paid to them.

The School Board answered that their only object in stipulating for immediate possession of the property was that they might commence their building at once, and they alleged that they had not been supplied with the necessary documents for completing the Plaintiff's title to the property.

It appeared that an abstract of the Plaintiff's title had been furnished, commencing with a conveyance of certain portions of the property, dated the 25th of November, 1853, by which the fee simple was conveyed by *Samuel Walker* to *Thomas Bolton*, the

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testator, under whose will the Plaintiffs derived their title, and the School Board required to be furnished with a forty years' title. The conveyance of 1853 contained a recital that *S. Walker*, the vendor, was seised in fee simple of the property in question.

J. Pearson, Q.C., and *D. Jones*, for the Plaintiffs:—

Although we allowed the School Board to have possession of our property we gave them no permission to commence pulling down the house before the title was accepted. If they should eventually refuse the title, we should suffer serious damage and be put to great expense; we therefore desire to have the purchase-money paid into Court under the 85th section of the *Lands Clauses Act* (8 Vict. c. 18).

We have supplied an abstract of title commencing with a conveyance dated in the year 1853 to the testator, under whose will we are now selling the property. That conveyance contains a recital that the vendor was seised in fee of the property. The Defendants still require a forty years' title, but we submit that under the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. 78), the recital in the conveyance of 1853 is sufficient evidence that the vendor was then seised in fee of the property, and the Defendants are not entitled to any further evidence of that fact, and have no right to call for a forty years' title.

Higgins, Q.C., and *Jason Smith*, for the School Board:—

When the arrangement was made for paying the purchase-money into the *Union Bank*, and for giving us liberty to take possession, it was well known to the Plaintiffs that we required possession for the express purpose of commencing our works, it being of great importance that the school-house should be built as speedily as possible. The delay in the completion of the conveyance has been caused by the Plaintiffs not completing the necessary evidence of their title. Under the 1st section of the *Vendor and Purchaser Act* we are entitled to a forty years' title, which term is there substituted for the old term of sixty years. The 2nd section, rule 2, provides that recitals, statement, and descriptions of facts, matters, and parties contained in deeds twenty years old shall be taken to be sufficient evidence of the truth of such

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facts, matters, and descriptions. But a recital that a man is seised in fee is not a recital of a fact within the meaning of that section. It is only a recital of a proposition of law. And though it may be evidence that he was in possession of the property, it does not preclude us from having evidence of his title, and we have the same right to a title of forty years as if there had been no such recital.

J. Pearson, in reply.

MALINS, V.C.:— Judgment.

The original motion is to restrain the Defendants, the School Board, from proceeding to pull down certain buildings on property which they had contracted to purchase from the Plaintiffs, who are trustees under the will of Mr. *Bolton*, whose affairs are being administered in this Court. That application was made to me on Saturday by Mr. *Pearson*. I granted the order with some reluctance, but I considered that it was only an order to last for four days, and I intimated at the time that if the School Board were put to any inconvenience they could come on Monday, Tuesday, or Wednesday, to dissolve that order; therefore I did not think there would be much harm in doing it; and by the order the Plaintiffs were answerable in damages.

The motion is now brought on upon notice, and I am fully informed of the facts. It turns out that on the 19th of December last the Plaintiffs, knowing perfectly well that the School Board had only one object in buying this property, which was to pull down the old buildings and to erect a new school-house, deliberately enter into a contract by which it is provided that the money, £4300, being deposited in the *Union Bank*, in certain names, the purchasers should be at liberty to enter into possession. The money was deposited on the 16th of February, and thereupon the School Board took possession. Now, what was the object of their requiring possession? There was but one. They did not buy this property to get rents from other tenants, but clearly to put upon it a different building. Therefore I am clearly of opinion that the Plaintiffs, by consenting to the Defendants taking possession, were consenting to their taking possession to use for that

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purpose which everybody knew was the only purpose for which they wanted it; and, therefore, by that contract the vendors were bound, and it was, in my opinion, improper for them to come afterwards and ask to restrain the School Board from doing that which it was the very object they should have the possession for, and the motion is, in my opinion, wholly unsustainable. It is provided by the contract that the money being deposited it shall be received by the vendor on making a good title. What doubt is there about the title? I cannot see the slightest doubt in the world. The abstract has been delivered commencing in 1853. Mr. *Higgins* says they are now entitled to a forty years' title, and this only shews twenty-four; but this abstract begins with a deed which was a purchase deed, and every man's experience leads him to believe that in almost every case the purchaser investigates the title when he purchases, and he, therefore, being satisfied that his vendor is seised in fee, the title is then deduced from that time. Therefore, the Legislature has, in my opinion, most wisely provided, that although by the first section, under special circumstances, you must have a title for forty years, yet that any recitals, statements, and descriptions, facts, matters, and parties, contained in a deed or Act of Parliament, which is twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts. What does this abstract which has been delivered contain? It begins the 25th of November, 1853, with a purchase deed by which *Samuel Walker* conveys to the testator in the cause, and it contained this recital, that *Walker*, that is, the vendor, was seised in fee simple in possession of the said several pieces of ground. Mr. *Higgins* says that is not a statement of fact, but a proposition of law. I beg to express my opinion that it is a statement of fact that he was not only in possession, but he was in possession in fee simple of the pieces of land which were conveyed. Therefore that relieves the Plaintiffs from the necessity of shewing a forty years' title, because they have a deed twenty years old, which recites that the then vendor was seised in fee simple. This, in my opinion, was a perfectly good commencement of title. The vendors having, therefore, shewn that the testator acquired the fee simple of the property, and everything that he acquired

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being now in the trustees, a good title is thus shewn, and the event has happened which would entitle the Plaintiffs to have the purchase-money paid into Court, and all questions between them thus settled.

Now, I have before me two motions, the first to restrain the School Board from proceeding to do that which I think they are clearly entitled to do—to pull down and demolish the houses—that motion entirely fails, and must be dismissed with costs. But then the School Board seem to have tried whether they could put themselves in the wrong, and I having granted an order that they should not pull down until after Thursday, the order therefore coming to an end unless renewed this day, they think it necessary to give a notice of motion to dissolve this day that which the day itself would dissolve. The excuse made for it was, that it was until after the 28th or further order, and the notice served on the School Board does seem to contain those words; but the order itself being served contained no such words, and even if it had I am clearly of opinion that the intimation given me by the Registrar is right, that when an interim order is made to extend over a certain day or until further order, it does not mean that it is to go on after that day or until further order, but that it is to stop earlier if the Court shall so order—"until that day or further order," meaning at an earlier date. Therefore the notice of motion to dissolve this order, which would dissolve itself if not continued, was wholly unnecessary, and that also must be dismissed with costs. The result, therefore, is, that I dismiss both motions with costs, which I think is the fate they both richly deserve. With regard to the question of title, I express that as a general opinion only.

J. Pearson called the attention of the Court to the word "matter" in the 2nd sub-section of the 2nd clause of the *Vendor and Purchaser Act*, and said it was evident that if a seisin in fee was not a "fact," it certainly was a "matter," and the last line of the section provided—"shall be taken to be sufficient evidence of the truth of such facts, matters, and descriptions."

MALINS, V.C.:—

If you say *A. B.* is in possession of *Blackacre*, that is a fact.

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Then you say, Is he in possession for so many years, or as tenant for life or tenant in fee? He is in possession as tenant in fee. That is a fact. I think this is a most beneficial enactment. I can only say that when I practised as a conveyancer, in drawing conditions of sale I invariably inserted a condition that all recitals and statements in deeds more than twenty years old should be taken as conclusive evidence of the facts stated. The recital in the deed of 1853 is not conclusive, it is only *primâ facie* evidence; but those who object to it must shew that it is untrue.

Solicitors for Plaintiffs: *Allen & Edwards.*
Solicitors for School Board: *Gedge, Kirby, & Millett.*

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LONDON AND PROVINCIAL BANK *v.* BOGLE.

V.-C. B. 1878 Jan. 25.

[1876 L. 219.]

Judgment Debt—Married Woman—Debt incurred before Marriage—Separate Estate—Restraint on Anticipation—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 12—*Married Women's Property Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *s.* 3—*Costs of Husband's successful Defence added to Debt.*

In an action against a married woman and her husband for a debt contracted by the wife previously to her marriage, judgment was entered against the wife for principal, interest, and costs, but in favour of the husband with costs under the provisions of the *Married Women's Property Act*, 1870, and the *Amendment Act*, 1874. The wife's property having been settled on her marriage for her separate use without power of anticipation, the Plaintiffs commenced an action in the Chancery Division, for the purpose of enforcing the judgment obtained by them against the wife, and further, to be allowed to add to this the costs they had had to pay the husband:—

Held, that, notwithstanding the restraint against anticipation, the Plaintiffs were entitled to recover against the separate estate of the wife the amount of their judgment debt and costs, as well as the costs paid to the husband, which might be added to their original debt.

Statement.

ACTION for payment of a judgment debt, and certain costs, out of the separate estate of the Defendant *Clara Bogle*.

In March, 1875, Mrs. *Bogle*, who was then unmarried, executed four joint and several promissory notes in favour of the Plaintiffs for four sums, amounting in all to £678 12*s.* 11*d.*, and payable at three, six, nine, and twelve months after date. In April following Mr. and Mrs. *Bogle* were married, and by an antenuptial settlement all her property, which consisted of more than £10,000, invested in valuable securities in the *United States*, was assigned to trustees upon trust to pay the income to her during her life for her separate use without power of anticipation, with ultimate trusts after her death in favour of the husband for life and the issue of the marriage. Some furniture, plate, china, and other articles were vested in the trustees for Mrs. *Bogle's* separate use, and the settlement also contained a power, at the joint request of Mrs. *Bogle* and her husband, to raise and pay her, on her sole receipt, the sum of £1000.

In March, 1876, the amounts due on the notes being still

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unpaid, the Plaintiffs commenced four several actions in the Queen's Bench Division against Mr. and Mrs. *Bogle* to enforce the payment of the principal and interest thereby secured. To these actions (which were afterwards consolidated) the husband pleaded the *Married Women's Property Act*, 1870, s. 12, and the *Married Women's Property Amendment Act*, 1874, s. 3, alleging that he had not and never had at the time or since his marriage any assets in respect of which he, under the provisions of these Acts, was liable for his wife's debts contracted before marriage. At the trial of the action at the *Swansea* Assizes, judgment was entered for the husband with costs, but against the wife, for £707 5*s.* 7*d.*, the amount due for principal and interest, and £158 6*s.* 9*d.* for costs. The whole of Mrs. *Bogle's* property being included in the settlement, the present proceedings were instituted by the Plaintiffs against Mr. and Mrs. *Bogle* and the trustees of the settlement to obtain payment of the said sums of £705 5*s.* 7*d.* and £158 6*s.* 9*d.* (amounting to £863 12*s.* 4*d.*), and for the further sum of £65 9*s.* 1*d.* for the costs they had paid Mr. *Bogle* in the action in the Queen's Bench Division.

It was alleged that the power of raising £1000 had been exercised, and the money paid to Mrs. *Bogle*. The questions now raised were whether sect. 12 of the *Married Women's Property Act*, 1870 (1), extended to property settled to the separate use of a married woman without power of anticipation. And also whether the husband's costs paid in pursuance of the *Amendment Act*, 1874, s. 3 (2), could be added to the original debt and recovered out of the wife's separate estate.

The statement of defence alleged that Mrs. *Bogle* had no knowledge of these promissory notes before the marriage, and that the restraint on anticipation was inserted in the settlement in pursuance of an express stipulation on the treaty for the marriage.

(1) Sect. 12. "A husband shall not by reason of any marriage which shall take place after this Act has come into operation be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried."

(2) Sect. 3. "If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife."

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Sir *H. Jackson*, Q.C., and *C. Clement Berkeley*, for the Plaintiffs:—

A married woman who has incurred liabilities before her marriage, cannot take her property out of the power of her creditors by settling it upon herself for her separate use without power of anticipation: neither on principle, *Higinbotham* v. *Holme* (1); nor on authority, *Sanger* v. *Sanger* (2); *Seton* on Decrees (3).

We are clearly entitled to recover the judgment debt and costs out of Mrs. *Bogle's* separate estate, and further, to recover the amount we have had to pay the husband for his costs, which were costs incurred in enforcing our security. Under the *Amendment Act*, 1874, we were obliged to sue the husband jointly with the wife, and under sect. 3 to pay the costs of his successful defence. We are also entitled to the costs of these present proceedings.

[They also referred to *Chubb* v. *Stretch* (4) and *Biscoe* v. *Kennedy* (5).]

Jason Smith, for Mrs. *Bogle*:—

Though the notes were given before marriage, yet judgment was entered up after the marriage, and the original debt being merged in the judgment, *In re European Central Railway Company* (6), there is no debt contracted before marriage. The case of *Sanger* v. *Sanger* is clearly different from the present case, because here it is part of the contract entered into for the benefit of the husband as well as of the wife that anticipation should be restrained, whereas in *Sanger* v. *Sanger* there was no such contract, the restraint on anticipation being imposed by a third person. The husband's costs cannot be allowed, for the Plaintiffs might have accepted the husband's plea at once, and so have avoided them. Under any circumstances, I submit that the debt and costs should come out of the corpus and not out of the income.

John Chester, for the trustees of the settlement, was not called on as to payment of the debt and costs out of the corpus.

(1) 19 Ves. 88.
(2) Law Rep. 11 Eq. 470.
(3) 4th Ed. p. 465.
(4) Law Rep. 9 Eq. 555.
(5) 1 Bro. C. C. 17, n.
(6) 4 Ch. D. 33.

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BACON, V.C.:—

This is clearly a debt contracted by the wife before her marriage, within the words of sect. 12 of the *Married Women's Property Act*, 1870, and therefore a debt for which her separate estate is liable. What is her separate estate? Clearly it is her right to receive the income of her settled property, as well as the furniture, plate, and other articles which the trustees hold for her separate use, and that £1000 (if it has not been already raised) payable to her under the power in the settlement. As to the costs in the common law action which have been paid to the husband by the Plaintiffs, these were solely occasioned by the unrighteous conduct of the wife in resisting this claim; the Plaintiffs were obliged to make the husband a party; how otherwise were they to know that the husband had no assets in respect of which he could be made liable for his wife's debts contracted before marriage? They were not bound to accept his plea without investigation. The Plaintiffs as creditors are entitled to all the necessary costs that they have been put to in enforcing their claim. I therefore think that they are entitled to add the costs of the husband's successful defence to their debt. There must be a declaration, as asked for by Sir *H. Jackson*, that the Plaintiffs are entitled to recover against the separate estate of Mrs. *Bogle* included in the settlement, notwithstanding the restraint on anticipation, the amount of their judgment debt and costs, and also the amount of the costs paid by them to Mr. *Bogle* in the previous action. There will also be an inquiry what property is held upon trust for the separate use of Mrs. *Bogle*, with a direction to the trustees out of such estate, as and when received, to pay the said judgment debt and costs, husband's costs, and the costs of this action. The trustees' costs must be paid by the Plaintiffs, and added to their debt and costs.

Solicitors for Plaintiffs: *Smith, Davies, & Co.*, agents for *Thomas Henry Ensor, Cardiff.*

Solicitors for Defendants: *R. S. Taylor & Sons.*

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DUKE OF NORTHUMBERLAND *v.* TODD.

V.-C. H.
1878
Jan. 29;
Feb. 6.

[1876 N. 124.]

Practice—Plaintiff's Local Solicitor, Affidavit sworn before.

In an action in the Chancery Division, the Plaintiff's *London* solicitors, who were his only solicitors on the record, employed a firm who were his country solicitors in getting up evidence. This business was done entirely by one of the partners in the country firm, but some of the affidavits filed on behalf of the Plaintiff were sworn before the other partner:—

Held, that such affidavits were inadmissible.

Statement.

THIS was an action to restrain the Defendant from continuing in the possession or occupation of a farm in *Northumberland*, or of the crops thereon, and from allowing his stock to remain on the farm, or to consume the crops, and for damages.

During the hearing of the action a question arose as to the admissibility of certain affidavits filed on behalf of the Plaintiff under the following circumstances:—

Messrs. *Bell & Steward*, the Plaintiff's private solicitors in *London*, were his only solicitors on the record. Messrs. *Leadbitter & Harvey*, of *Newcastle-on-Tyne*, were the Plaintiff's local solicitors in *Northumberland*. The latter firm were employed in getting up the country evidence for the solicitors in the action, and in conducting such matters connected therewith as required local attention, but Mr. *Harvey* alone had the charge of this business, and he had made certain affidavits in support of the Plaintiff's case. Mr. *Leadbitter*, the other member of the firm, had nothing whatever to do with the action, except that he had made an affidavit therein verifying an exhibit. Several of the affidavits filed on behalf of the Plaintiff, including one by *Robert Muckle*, his land agent, and one by Mr. *Harvey*, had, however, been sworn before Mr. *Leadbitter*, who was a Commissioner to administer Oaths in the High Court of Justice.

Argument.

W. Pearson, Q.C., and *W. Griffith*, for the Defendant:—

The affidavits sworn before Mr. *Leadbitter* are inadmissible.

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He is a member of the firm who are the Duke's country solicitors, and who probably prepared the affidavits so sworn. The principle is that the commissioner must be perfectly unbiassed, and must not be a person who is acquainted with all the facts of the case. The rule is not confined to the solicitor on the record, but extends to his clerk or agent: *Wood* v. *Harpur* (1); *Hopkin* v. *Hopkin* (2); *In re Gregg* (3); *Foster* v. *Harvey* (1) (4); *Morg.* Ch. (5).

Again, by the 143rd of the General Rules at Common Law of Hilary Term, 1853 (6), it is ordered that "Where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself."

Here Mr. *Leadbitter* was a *quasi* clerk to the solicitors on the record, for a clerk means a person employed by the solicitor to get up the evidence; and even if not within the letter he is within the spirit of the rule.

Dickinson, Q.C., and *Yate Lee*, for the Plaintiff:—

The rule was at first limited to affidavits sworn before the attorney in the cause, and did not extend to his clerk, if a commissioner. It has, however, been since extended, and it now embraces both the solicitor on the record and his clerk, as being the persons by whom the affidavits have to be prepared; but beyond this the Court has never gone. There is no pretence for saying that Mr. *Leadbitter* is either the solicitor on the record, or the agent or clerk of the solicitors, who are the Duke's private solicitors, or that he prepared the affidavits. It is said that he is acquainted with all the facts of the case, but who could be better acquainted with the facts of the case than the commissioner in *Foster* v. *Harvey*, where the Plaintiff was himself a solicitor, and an affidavit sworn by him before one of his own clerks was admitted

(1) 3 Beav. 290.
(2) 10 Hare, App. ii.
(3) Law Rep. 9 Eq. 137.
(4) 11 W. R. 899; S. C. on appeal, 9 L. T. (N.S.) 405.
(5) 5th Ed. 203.
(6) 2 Lush. Pr. 3rd Ed. p. 876.

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in evidence. In that case, on appeal (1), Lord Justice *Turner* said that the rule ought to be confined to the case of solicitors on the record and their clerks, and Lord *Romilly*, M.R., in *In re Gregg* (2), referring to these remarks, expresses himself as of the same opinion. Again, if the agent in town is the solicitor on the record, it is no objection to the affidavit of the party that it is sworn before his own attorney in the country: *Read* v. *Cooper* (3); *Williams* v. *Hockin* (4); *Tidd's* Practice (5). These authorities lay down the rule; and this gentleman, who is not even the country solicitor, is neither within the letter nor the spirit of it.

Argument.

W. Pearson, in reply.

HALL, V.C.:—

My present impression is that the objection must be sustained, and that these affidavits are within the principles acted upon by the Court of Chancery with reference to the necessity of having the evidence taken before persons who are unbiassed in the matter. That conclusion is fortified by the Rules of Common Law referred to in the argument, which treat the country solicitor as in the same position with the town solicitor. And I think the case is within the principle of the rule that the clerk of the solicitor on the record cannot be allowed to be the commissioner to take the evidence. Accordingly, it appears to me that the country solicitor employed by the town solicitor (who is the real solicitor in the action, and is not acting merely as agent) to get up the evidence and do what is necessary with reference thereto in the country is quite as obnoxious to the rule as a clerk would be. That is my present impression. But as the decision of the point, if I decide it that way, will go beyond any previous actual decision in this branch of the Court, and the case on this point seems to a considerable extent a new case, I think I should not be doing justice if I rejected this evidence without giving the Plaintiff an opportunity of calling the witnesses to whose affidavits the objection

Judgment.

(1) 3 N. R. 98.
(2) Law Rep. 9 Eq. 137.
(3) 5 Taunt. 89.
(4) 8 Taunt. 435.
(5) 9th Ed. vol. i. p. 494; New Practice, p. 244.

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applies, and of taking their evidence *vivâ voce*. The practical effect of this would be to postpone the hearing unless the objection is withdrawn.

W. Pearson:—My principal reason for not withdrawing the objection is that I want to see those witnesses.

HALL, V.C.:—I have not yet absolutely decided the question, and will give it further consideration.

The objection was ultimately withdrawn, except as to the affidavits of two witnesses who attended on a subsequent day and were cross-examined.

1878. Feb. 6. HALL, V.C., in delivering judgment in the action, said:—

It was said in the course of the argument in this case that some affidavits were improperly sworn before the country solicitor. At the time when that objection was discussed and considered I stated my opinion that it was a good objection. I have since then further considered that objection, and I desire to say that, having done so, I adhere to my former opinion. The point is of some practical and general importance, being one of principle, and not of mere technicality; and I think that is the fair conclusion to be drawn from the authorities which were referred to. I may also mention that the cases upon the subject are nearly all of them collected and commented upon in the case of *Ross* v. *Shearman* (1).

Solicitors: *Bell & Steward; John Tucker*, agent for *T. W. Welford, Hexham.*

(1) Coop. C. P. (1846) 172.

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EDEN *v.* NAISH.

V.-C. H.

1878

Jan. 11, 18, 24; Feb. 7.

[1876 E. 121.]

Partnership, Action for Dissolution of—Agreement of Compromise—Repudiation by Plaintiff—Summons by Defendant to stay further Proceedings in the Action—Judicature Act, 1873, *s.* 24, *sub-ss.* 5, 7—*Jurisdiction—Costs of one Counsel for each of two Defendants, Co-partners.*

A partnership having, in an action brought by the Plaintiff, been by order of the Court dissolved, the Plaintiff and Defendants signed an agreement of compromise, whereby it was agreed that the Plaintiff should be paid a sum of money for his share in the business.

The Plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud:—

Held, on summons taken out by one of the Defendants, and supported by the co-Defendant, that the Court had, under the *Judicature Act*, 1873, s. 24, sub-ss. 5, 7, jurisdiction to order the stay of all further proceedings in the action:

Held, also, that as the Defendants had severed upon the summons, and been represented by four counsel, the costs to be paid by the Plaintiff would be for one counsel only for each Defendant.

Statement.

THE Defendants *Naish* and *Osborn* had for some time prior to the 2nd of April, 1860, carried on in partnership the business of ironfounders. On the 2nd of April, 1860, they and the Plaintiff entered into a partnership for the term of fourteen years for the purpose of carrying on the business of lathe-makers and general fitters. After that term had expired the partnership was continued as one at will. Differences having arisen between the Plaintiff and the Defendants as to the mode of carrying on the business and keeping the accounts, the Defendant *Naish* on the 29th of December, 1876, gave to both his partners notice of his intention to dissolve the partnership on the 31st of March, 1877, and on the same day the Plaintiff issued a writ in an action for the same purpose, and on the 12th of January, 1877, delivered his statement of claim, praying to have the partnership dissolved; to have all the accounts taken in accordance with the articles of partnership; a receiver and manager appointed; and for costs.

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V.-C. H. 1878 EDEN v. NAISH. Statement.

The Defendant *Naish*, on the 20th of February, 1877, and the Defendant *Osborn*, on the 26th of that month, filed their defences, stating in effect that the Plaintiff had committed breaches of the articles of partnership, and that they were willing to dissolve the partnership, but submitting that a dissolution by the Court was unnecessary, and that there was no necessity for the appointment of a receiver and manager, as the business could be wound up satisfactorily by the Defendants, as the sole continuing partners, under the provisions of the articles of partnership, and that the action was uncalled for and vexatious, and praying for costs.

On the 16th of March, 1877, the Plaintiff filed his reply, denying the statements of the Defendants that the action was vexatious, and alleging that it was necessary to have the decree of the Court for a dissolution, and as prayed.

On the 19th of April, 1877, judgment for a dissolution was given, and the usual accounts were directed; and a reference was made to Chambers for the appointment of a receiver, and on the 4th of May, 1877, a summons was taken out by the Plaintiff for that purpose, but before any appointment was made negotiations took place with a view to a compromise of the matters in difference. Those negotiations were continued for some time, and ultimately, with the assistance of a Mr. *Taylor*—a friend, as alleged, of the Plaintiff—but without the advice of any solicitor to either party, the following agreement was on the 8th of June, 1877, signed by all parties:—

"*Coleshill Street*, 8th June, 1877.

"*Arthur John Naish* and *Thomas Osborn* agree to pay, and *William Eden* agrees to receive, the sum of £1200 for the whole of his share and interest in the firm and business of the late firm of *Naish, Osborn, & Eden*, 22 *Coleshill Street*, and at once to cease all legal proceedings; and *William Eden* accepts, as a portion of the said £1200, the money which he has received on account of the late firm.

"*A. J. Naish* and *Thomas Osborn* agree to pay £700, inclusive of the above sum already in *William Eden's* hands, within eighteen days from this date, and to give acceptances for the remainder in two equal moieties at four months and eight months

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respectively, such acceptances to bear interest at 5 per cent. per annum."

[Witness's signature.] [Parties' signatures.]

"All expenses charged by the Court of Chancery to the estate to be equally divided. Each one to pay his own solicitor's expenses."

Witnesses' signatures.
Parties' initials.

Statement.

It was stated in reference to the sums mentioned in the agreement, that certain moneys had been received by the Plaintiff on account of the partnership between March, 1877, and the date of the agreement.

The Plaintiff shortly afterwards repudiated the agreement, alleging that it had been obtained from him improperly, in fact by trickery and fraud, and he said that he was not a free agent when it was put before him, that he was led to sign it by surprise, and that the instruction which he gave to Mr. *Taylor* in the matter was to see a Mr. *Manton*, an old friend of the Plaintiff, and consult with him upon the subject, and therefore he proposed to proceed with his action.

On the 2nd of July, 1877, the Defendant *Naish* took out a summons, which was afterwards adjourned into Court to come on as a motion, asking that all further proceedings in the action might be stayed upon the terms mentioned in the agreement of the 8th of June, 1877. The action was subsequently ordered to stand over in order that Mr. *Taylor*—who stated that he, at the request of the Plaintiff, proposed to the Defendants that they should pay the Plaintiff £1200 for his interest, and, having obtained their assent, submitted the arrangement to the Plaintiff, who accepted it—and other witnesses might be cross-examined on their affidavits, and that having taken place, the summons came on to be heard on the 11th of January, 1878. The view taken by the Vice-Chancellor of the evidence is expressed in the judgment.

Argument.

Dickinson, Q.C., and *J. G. Alexander*, for the Defendant *Naish's* summons, now moved for an order in the terms of the summons, and submitted that the Court had, under the provisions of the *Judicature Act*, 1873, s. 24, sub-ss. 5, 7, power to grant it. They re-

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ferred to the case of *Pryer* v. *Gribble* (1), where Lord Justice *James*, on the 7th of June, 1875, held that an agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance; but said (2): "Perhaps it is to be regretted there should be this distinction; possibly, under the new system which may come into operation in the ensuing month of November, there may be power in the Court to deal more summarily with these things, and possibly it may be right and convenient that the Court should make a proper order the moment it has ascertained the facts."

Cozens-Hardy, as *amicus curiæ*, mentioned the case of *Hakes* v. *Hodgkins* (heard by the Master of the Rolls in Chambers, and decided on the 17th of May, 1877), and said it was an action by which the Plaintiff claimed to have a lien upon the purchase-money of property sold by the Defendant. After the defence had been delivered an agreement was come to to the effect that the Plaintiff would abandon all further proceedings in his action; take a reduced sum, and pay all the costs of the Defendants. The Plaintiff subsequently refused to carry out the agreement, and the Defendants applied by summons to stay the action upon the terms of the agreement. The Plaintiff objected that what was in effect specific performance of the agreement could only be obtained in a fresh action. The Master of the Rolls held that the Court had, under the *Judicature Act*, 1873, full jurisdiction to order upon the summons that all further proceedings should be stayed, and ordered that the agreement should be carried into effect.

Robinson, Q.C., and *W. Barber*, for the Defendant *Osborn*, supported the application.

W. Pearson, Q.C., and *Bardswell*, for the Plaintiff, submitted that in this particular case, which was a *quasi* action for specific performance of an agreement, the Court had no jurisdiction under the *Judicature Act*, 1873, s. 24, sub-ss. 5, 7, as they denied that the agreement was binding upon the Plaintiff. But even assuming that the Court had power, under the Act, to do what was asked

(1) Law Rep. 10 Ch. 534. (2) Law Rep. 10 Ch. 540.

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without any further action by the Defendants for the specific performance of the agreement, still there was a discretion given by sub-sect. 5, "if it shall think fit," to require that such action should be brought. This was an agreement quite *dehors* the Plaintiff's action; and the utmost, it was submitted, that the Defendants were entitled to was that if they should think proper to insist upon the agreement to have an order staying all proceedings in the Plaintiff's action until they should bring an action for the specific performance of the agreement, and in that case the Plaintiff would have liberty to exercise the rights which the practice and rules of the Court afforded him to have the validity or invalidity of the agreement determined. Under the old practice the Defendants would have been obliged to institute an independent action: *Pryer* v. *Gribble* (1). They objected that the case of *Hakes* v. *Hodgkins*, which had been decided in Chambers, and of which they knew nothing of the facts from a report, should be referred to and taken as an authority, and submitted that it was a very different case from the present, inasmuch as here it was absolutely necessary to take the evidence *vivâ voce* before a jury, in order to test the validity of the agreement; and therefore the rights of the parties could only be determined in an action for specific performance, in which the Plaintiffs would have to prove that the agreement was certain in all its parts, reasonable in all its terms, and that it had been fairly obtained; all of which could not be proved here.

Dickinson, in reply, submitted that the case of *Hakes* v. *Hodgkins* was exactly in point, and that it ought to be followed; and that the agreement was clear in its terms; was well understood by all the parties to it; and quite sufficient to enable the Court to determine what was meant by it.

Feb. 7. HALL, V.C.:— Judgment.

This is a summons which was taken out by the Defendants to stay all proceedings in the action by reason of an agreement come to between the parties to compromise the action, on certain

(1) Law Rep. 10 Ch. 534.

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V.-C. H. 1878 EDEN v. NAISH. Judgment.

terms, and to have that agreement carried into effect. The summons was resisted on the ground that it was not competent for the Court to deal with the object of it upon summons; that is, that it could only be dealt with by the Defendants bringing an action to enforce the agreement. That objection, I think, cannot be sustained. Since the *Judicature Act*, 1873, I consider that the Court can entertain such an application upon a summons. The Master of the Rolls did so in the case of *Hakes* v. *Hodgkins* (17 May, 1877), and the Lord Justice *James*, in *Pryer* v. *Gribble* (1), a case before the Act came into operation, said that in his judgment the Act might possibly enable the Court so to do. It was, however, further objected, on behalf of the Plaintiff, that this case was of such a nature that the Court, in its discretion, should require an action for specific performance to be brought, or at all events give the Plaintiff the opportunity of bringing his case before a jury. It appears to me that that objection ought not to be allowed. Both parties have gone fully into evidence, and there has been a cross-examination of the witnesses on behalf of both parties, and I have not seen any reason why the case should not be heard and determined now. If the Plaintiff had wished for a trial by a jury, I think that he should at an earlier stage have taken steps to obtain it if he could; but I say further, that in this particular case, had an application for a trial by a jury been made even in an action brought for the purpose of enforcing the agreement, I should not have granted it. I think it is a case in which I should have refused it, considering the language of Order XXXVI., rule 26. I am of opinion, therefore, that the case must be dealt with upon its merits. I have since the arguments carefully read over all the affidavits and cross-examinations, and I have come to the conclusion that Mr. *Taylor* had such authority from the Plaintiff as fully entitled him to agree on his behalf to take the sum of £1200 for his share in the business, and that, too, without obtaining the sanction of Mr. *Manton*, or the agreement being subject to the subsequent approval of Mr. *Manton;* and further, that the Plaintiff did not sign the agreement under any circumstances which entitled him to resist its performance. I think Mr. *Taylor's* evidence is to be relied on, and that where that evidence is at variance

(1) Law Rep. 10 Ch. 540.

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with that of the Plaintiff the Plaintiff's evidence is not to be relied on; Mr. *Taylor* being, I consider, altogether a disinterested person, and the Plaintiff having in many particulars made statements in his affidavits which, according to his own admissions, were not based on anything warranting them, and which are proved to be contrary to the fact. I think Mr. *Taylor* acted honestly, and with every desire to make a good arrangement for the Plaintiff; and I see no ground for believing that he did not do so, or that the Plaintiff's signature to the agreement was improperly obtained.

It was urged that the agreement was uncertain in its terms, and on that account not proper to be ordered to be specifically performed. I do not think so. The supposed ambiguities were in reference to the moneys which he had received on account of the late firm of *Naish & Osborn*, and which clearly had reference to the Plaintiff's receipts since the dissolution and to certain expenses charged, but which could, I think, have been easily ascertained. That objection, I should mention, is not mentioned by the Plaintiff in his affidavit. If there had been any uncertainty in his mind, he would, no doubt, have mentioned it. The objection is the offspring of counsel's ingenuity, and is, I think, without foundation.

The order will be, as asked by the summons, to stay all proceedings in accordance with the terms of the agreement, and the Plaintiff must pay the Defendants' costs out of the sum of £1200; but as I do not see why the Defendants should have severed and be represented by four counsel, I shall allow the costs of one counsel only for each Defendant. There will be liberty to all parties to apply.

Dickinson, Q.C. (*J. G. Alexander* with him), for the Defendant *Naish*, then moved for an inquiry as to what damages ought to be paid to him in regard to loss which he had sustained in consequence of the repudiation of the agreement and the course pursued by the Plaintiff.

Robinson, Q.C. (*W. Barber* with him), for the Defendant *Osborn*, supported the motion.

HALL, V.C., without calling upon *W. Pearson*, Q.C., and *Bards-*

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well, for the Plaintiff, said he saw no reason for directing any such inquiry, and therefore the motion must be refused with costs, which the Plaintiff would set off against the costs which he would have to pay to the Defendants.

Solicitors: *John Letts*, agent for *J. Howard Baker, Birmingham; Burton, Yeates, & Hart*, agents for *Johnson, Barclay, & Johnson, Birmingham; Henry Tyrrell*, agent for *Joseph B. Clarke, Birmingham.*

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LUKE *v.* SOUTH KENSINGTON HOTEL COMPANY.

FRY, J.

1877

Dec. 19, 20, 21.

[1875 L. 23.]

Parties—Mortgage—Foreclosure—Action by one alone of several Co-Mortgagees—Action to set aside Deed by Party who did not execute it—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Rules of Court*, 1875, *Order* XVI., *rr.* 2, 13.

As a general rule, one of several co-mortgagees cannot maintain an action to foreclose the mortgage, making the other co-mortgagees Defendants, even though they do not oppose the foreclosure.

Semble, that such an action might be maintained if the Plaintiff's co-mortgagees were colluding with the mortgagor, or if it were necessary that the Court should act in haste to protect the mortgaged property.

A person named (jointly with others) as a party to a deed, but who did not execute it, cannot alone maintain an action to have the deed declared invalid.

If it was intended that the deed should not be binding in equity unless all the joint parties should execute it, those who did execute it are capable of joining in an action to have it declared invalid, and in an action for that purpose they ought to be named as Plaintiffs.

Statement.

THIS was a suit commenced by bill filed in the High Court of Chancery on the 6th of February, 1875, for the purpose of obtaining a declaration that a certain deed of the 24th of August, 1870, was invalid and ineffectual to release the Defendant Company, or the premises comprised in an indenture of mortgage of the 23rd of May, 1864, from any part of the mortgage debt of £9216 thereby secured, and for foreclosure of the mortgage. The mortgagees were the Plaintiff *William Luke*, and *Edward Davies Browne* and *Sampson Sandys*, two of the Defendants, the mortgage money belonging to them as trustees of the will of Dr. *Stephen Luke*. The Defendant Company were the owners of the equity of redemption of the mortgaged property.

The Plaintiff and the Defendants *Browne* and *S. Sandys* were the trustees of the will of Dr. *Luke*, the Plaintiff's father, who died in the year 1829, and in the year 1864 there were standing in their names as such trustees two sums of £7188 9*s.* 4*d.* and £753 2*s.* 2*d.* Reduced 3 per Cent. Annuities, and two sums of £2000 and £373 1*s.* 3*d.* New 3 per Cent. Annuities. Mrs. *Blakeley*, a granddaughter of the testator, was tenant for life of

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the sums of £7188 9*s.* 4*d.* and £2000, and also of one-fifth part of the two smaller sums. The Plaintiff was entitled to one-fifth part of the two smaller sums, and the other three-fifths belonged respectively to three of his brothers.

In May, 1864, the Plaintiff and the Defendants *Browne* and *Sandys* sold these four sums of stock and handed the proceeds of the sale, amounting to a sum of £9216 cash, to a company called the *South Kensington Hotel Company* (not the Defendant Company), which will be called, for the sake of distinction, the Old Company, upon the security of a mortgage dated the 23rd of May, 1864, of some leasehold property at *South Kensington* belonging to the Old Company. The property was already subject to a prior mortgage to the trustees of the *County Fire Office*, to secure a sum of £13,600. The mortgage deed of the 23rd of May, 1864, contained the ordinary mortgage covenants by the Old Company, and it provided for the payment of interest on the mortgage debt at the rate of 6½ per cent., reducible to 5½ per cent. on punctual payment. Down to the 7th of April, 1869, Messrs. *Sandys & Knott* acted as the solicitors of all the trustees of Dr. *Luke's* will, but on that day the Plaintiff withdrew his retainer and thenceforth employed Messrs. *Janson, Cobb, & Pearson* as his solicitors in the matter of the trust. In the year 1869 the Old Company were in difficulties, and were unable to pay the interest on the mortgages upon their property, and the *County Fire Office* were threatening to sell the property under a power of sale contained in their mortgage. In November, 1869, Mrs. *Blakeley* commenced a suit in the Court of Chancery against the three trustees of Dr. *Luke's* will, seeking to make them accountable for a breach of trust by reason of the investment upon the mortgage of the 23rd of May, 1864, which was not authorized by the terms of the will. This suit was afterwards compromised.

In 1869 the Defendant Company were incorporated for the purpose of taking over the business, assets, and liabilities of the Old Company, and as part of this scheme of reconstruction they proposed to the trustees of Dr. *Luke's* will that they should accept a composition of £5725 upon the mortgage debt of £9216, and leave that sum upon the security of the mortgaged property for a term of ten years at 5 per cent. interest, reducible to 4 per cent.

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on punctual payment, the New Company covenanting for payment of the interest. The Defendants *Browne* and *S. Sandys* assented to this proposition. The Plaintiff was advised by his solicitors that the proposition was one which it would be desirable to accept if it could be legally assented to, but they conceived that there were legal difficulties in the way which could not be removed, and in consequence of this the Plaintiff refused to assent to the proposal. Resolutions were, however, passed for the winding-up of the Old Company subject to the supervision of the Court. The New Company was incorporated, and an agreement was entered into between the liquidators of the Old Company and the New Company for the sale to the New Company of all the property of the Old Company, including the interest of the Old Company in the property comprised in the mortgage of the 23rd of May, 1864. This agreement was sanctioned by the Court, and was afterwards carried into effect. A deed to carry into effect the proposed reduction of the mortgage debt of £9216 was prepared by the solicitors of the New Company, apparently under the impression that the Plaintiff either had assented to the proposition, or would do so. This deed bore date the 24th of August, 1870, and purported to be made between the Defendant Company of the one part, and the Plaintiff and the Defendants *Browne* and *S. Sandys* of the other part, and it was expressed to be thereby witnessed that the Plaintiff and the Defendants *Browne* and *S. Sandys* did thereby release the Old Company and the Defendant Company, and the property comprised in the mortgage of the 23rd of May, 1870, from all interest which had accrued due or was owing on the sum of £9216 previously and up to the 1st of January, 1870, and also from £3456, part of the £9216. And the Defendant Company did thereby covenant with the Plaintiff and the Defendants *Browne* and *S. Sandys*, their executors, administrators, and assigns, to pay to them the sum of £5760 on the 1st of July, 1870, together with interest thereon at the rate of 5 per cent. per annum as from the 1st of January, 1870, and to pay interest at the same rate half-yearly on the sum of £5760 (in case the same should not be paid on the 1st of July, 1870), or on so much thereof as should for the time being remain unpaid. There was a proviso for the reduction of the interest to 4 per cent.

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in the event of punctual payment. And it was agreed that if the Defendant Company should pay the interest at the rate of 5 per cent. within three calendar months next after the respective half-yearly days of payment, the mortgagees would not call in the principal, or take any proceedings for foreclosing the equity of redemption in the mortgaged property until the end of the term of ten years from the 1st of January, 1870; but if at any time during the ten years default should be made in payment of the interest, the conditional release thereinbefore contained was to be void, and all the rights of the mortgagees under the original mortgage of the 23rd of May, 1870, were to revive. This deed was executed by the Defendant Company, and by the Defendants *Browne* and *S. Sandys*, but the Plaintiff refused to execute it. After its execution the Defendant Company paid interest at the reduced rate upon the reduced mortgage debt to the solicitors of the Defendants *Browne* and *S. Sandys*, and interest was paid by them to Mrs. *Blakeley* according to the terms of the compromise of Mrs. *Blakeley's* suit.

The bill in this suit was filed on the 6th of February, 1875, against the New Company, *G. N. Mayhew* (who held a third mortgage upon the property comprised in the mortgage of the 23rd of May, 1864), and *Browne* and *S. Sandys*, co-mortgagees and co-trustees with the Plaintiff of the will of Dr. *Luke*. Mrs. *Blakeley* was afterwards added as a Defendant; but none of the other *cestuis que trust* were made parties. The bill alleged that the deed of composition of the 24th of August, 1870, was wholly inoperative and ineffectual to release or to postpone payment of the mortgage debt of £9216, or the interest thereon, or to release or extinguish any of the rights reserved to the Plaintiff and his co-trustees by the deed of the 23rd of May, 1864; that the £9216, together with a considerable arrear of interest thereon, was still due to the Plaintiff and his co-trustees upon the security of the mortgage of the 23rd of May, 1864, but that the Defendant Company alleged that the deed of the 24th of August, 1870, was valid and effectual notwithstanding the fact that the Plaintiff never executed the same, and denied that anything was due to the Plaintiff and his co-trustees under the mortgage of the 23rd of May, 1864. The bill did not state that the Plaintiff had

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applied to the Defendants *Browne* and *S. Sandys* to join him as co-Plaintiffs.

The bill prayed a declaration accordingly that the deed of the 24th of August, 1870, was invalid and ineffectual, and that it ought to be delivered up to be cancelled; that an account might be taken of what was due to the Plaintiff and his co-trustees for principal and interest, under the deed of the 23rd of May, 1864; that the Defendant Company and the Defendant *Mayhew* might be decreed to pay to the Plaintiff and the Defendants *Browne* and *S. Sandys* the amount so found due, and to pay the Plaintiffs the costs of the suit, and that in default of payment the Defendant Company and the Defendant *Mayhew* might be foreclosed of all equity of redemption in the mortgaged property. No relief was asked against the Defendants *Browne* and *S. Sandys*, or against Mrs. *Blakeley*.

The Defendant Company and the Defendant *Mayhew* by their answer insisted that the Plaintiff and Mrs. *Blakeley* had assented to the arrangement for the redemption of the mortgage debt, and that, notwithstanding the fact that the Plaintiff had not executed the deed of the 24th of August, 1870, he and Mrs. *Blakeley* were bound by the arrangement contained in it.

The Defendants *Browne* and *S. Sandys* by their answer said that they were not made aware of the Plaintiff's refusal to consent to the proposal for the reduction of the mortgage debt until after they had executed the deed of the 24th of August, 1870. They said that they executed the deed on the advice of their solicitors, and as they believed with the full concurrence of Mrs. *Blakeley* and her solicitors, and that they were advised, and believed, that under the circumstances the proposed arrangement was the most beneficial one that could be made for all persons interested in the mortgage debt. And they submitted the question of the validity of the deed to the Court.

Mrs. *Blakeley* did not put in any answer.

This was the trial of the cause.

Evidence was adduced to shew that the Plaintiff and Mrs. *Blakeley* had assented to or had become bound by the arrangement contained in the deed of the 24th of August, 1870, but the Court held that this was not proved.

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Argument.

Kekewich, Q.C., and *S. Dickinson*, for the Plaintiff:—

The Plaintiff is entitled to a decree and foreclosure in the form in which he asks for it. The deed of composition not having been executed by him, it cannot, whatever be its legal effect in releasing the debt due to the mortgagees jointly, alter the equitable rights of the mortgagees under the original mortgage deed. And the Defendants *Browne* and *Sandys* do not oppose the relief which the Plaintiff asks. Under the present practice no difficulty can arise as to parties or misjoinder: Rules of Court, 1875, Order XVI., rr. 2, 13.

But it is not necessary to go to the extent of asking for foreclosure; the Plaintiff may ask simply to have the deed of composition declared void and delivered up because it is a cloud on the title of the mortgagees, and may prevent their enforcing their rights under the original mortgage.

[FRY, J.:—The deed of composition is not set up against you yet, and there is nothing to shew that it will be. If it is void, as you say, why should you not put in force your remedies under the original mortgage? and if the deed of composition is then set up against you, will it not be time enough to get it out of your way?]

The mortgage debt is released at law by the execution of the deed by two of the co-mortgagees, though they may not be bound in equity, the intention being that the deed should not operate unless all the three executed it.

[FRY, J.:—If that be so, the two who executed it could maintain an action to have it declared not binding upon them: *Evans* v. *Bremridge* (1). I think it is a novelty for a person who did not execute a deed to ask to have it declared void.]

It would be practically impossible to sell the property while that deed is in existence, and the Plaintiff is entitled to have that cloud on the title removed.

Fischer, Q.C., and *Millar*, for the Defendants *Browne* and *Sandys*, stated (in answer to a question put by the Court) that those Defendants executed the deed of composition in the belief that

(1) 2 K. & J. 174; 8 D. M. & G. 100.

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the Plaintiff and Mrs. *Blakeley* would sanction the arrangement. They said that the Defendants *Browne* and *Sandys* did not oppose the relief sought by the Plaintiff, but they declined to be made co-Plaintiffs.

[FRY, J., referred to *Thornton* v. *McKewan* (1).]

North, Q.C., and *Rendall*, for the Defendant Company:—

Sect. 24, sub-sect. 7, of the *Judicature Act*, 1873, and Order XVI., rules 2, 13, do not help the Plaintiff.

[FRY, J.:—The Plaintiff might have brought an action against his co-trustees to compel them to join in a foreclosure action. May he not include the two actions in one to avoid circuity of action?]

He could not maintain such an action against his co-trustees in the absence of the *cestuis que trust*: *Butler* v. *Butler* (2). And even if the *cestuis que trust* were all made parties, the question whether a foreclosure action ought to be brought ought not to be raised in an action to which the mortgagor is a party; he has no interest in the determination of that question.

This is the first instance in which one of several co-mortgagees has attempted to maintain a foreclosure action. The action raises a question between the Plaintiff and two of the Defendants which has nothing to do with the question which arises between the mortgagees as a body and the mortgagor. This cannot be done: *Kevan* v. *Crawford* (3). Who would be entitled to say whether there should be a foreclosure or a sale? the Plaintiff, or the Defendants his co-trustees?

Then, if the Plaintiff is not entitled to a decree for foreclosure, he is not entitled to have the deed declared invalid.

[FRY, J.:—There are cases in which the Court of Chancery has ordered a void deed to be delivered up as being a cloud upon the title to real estate: *Mayor of Colchester* v. *Lowten* (4).]

The two mortgagees who did execute the deed have no equity against the company. There is nothing to shew that the deed was delivered as an escrow.

(1) 1 H. & M. 525.
(2) 5 Ch. D. 554; 7 Ch. D. 116.
(3) 6 Ch. D. 29.
(4) 1 V. & B. 226, 244.

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[FRY, J.:—But if the deed was not intended to operate till all three had executed it, could not the one who did not execute it come to the Court, upon the principle laid down by Lord *Eldon* in *Mayor of Colchester* v. *Lowten* (1), and ask to have the deed delivered up?]

In such a case the two who did execute the deed might ask to have it delivered up: *Underhill* v. *Horwood* (2); *Evans* v. *Bremridge* (3). If there is a cloud upon the title of the mortgagees, it is a cloud upon the title of all three, and it cannot be removed at the suit of one. *Non constat* that the Defendants consider it a cloud. They may think the arrangement a very beneficial one: *Onions* v. *Cohen* (4).

[FRY, J., referred to *Bromley* v. *Holland* (5).]

The deed is valid as between the company and the Defendants *Browne* and *Sandys*.

[FRY, J.:—I doubt whether it is.]

At law the release of the mortgage debt by two of the mortgagees is enough to destroy it: *Charlton* v. *Earl of Durham* (6); and the fact that they are trustees makes no difference. The company had no notice of the trust.

The evidence shews that the Plaintiff assented to the arrangement contained in the deed, or, at any rate, that he has become bound by it by subsequent conduct, and the same observation applies to Mrs. *Blakeley*: *Cheeseborough* v. *Wright* (7).

Fischer, Q.C., and *Millar*, for the Defendants *Brown* and *Sandys*.

Cookson, Q.C., and *Bush*, for Mrs. *Blakeley*:—

It is clearly proved that Mrs. *Blakeley* did not assent to the reduction of the mortgage debt. No relief is asked against her, and she is entitled to her costs.

Kekewich, in reply:—

It is not necessary that all the *cestuis que trust* should be made

(1) 1 V. & B. 226, 244.
(2) 10 Ves. 209.
(3) 2 K. & J. 174; 8 D. M. & G. 100.
(4) 2 H. & M. 354.
(5) 7 Ves. 3, 22.
(6) Law Rep. 4 Ch. 433.
(7) 28 Beav. 283.

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parties for the purpose of raising the question whether a foreclosure action ought to be brought. The Defendants *Browne* and *Sandys* do not allege either that it would not be advisable to have a foreclosure, or that the *cestuis que trust* object to it. They only decline to be co-Plaintiffs, because they executed the deed of composition. The trust estate as a whole is not bound by the deed, and the *cestuis que trust* would be entitled to have the original security realized. Under such circumstances one trustee can maintain this action for the benefit of the trust. At any rate, the Plaintiff is entitled to have the cloud on the title removed.

Argument.

[FRY, J.:—*Carew's Case* (1) shews that if two persons execute a deed on the faith that a third will do so, and he does not, they are not bound in equity, and that they would be entitled to ask the Court to make a declaration to that effect.]

Suppose one of two co-mortgagees was of unsound mind, could not the other maintain an action to foreclose the mortgage if it was desirable that it should be foreclosed? Why should it be necessary to bring two actions, the first to determine whether a foreclosure action ought to be brought? The question is merely one of form. All the materials are before the Court, to enable it to determine whether the mortgage of May, 1864, is still subsisting. The only person who objects is the mortgagor: *Hawkshaw v. Parkins* (2).

Judgment.

FRY, J., after stating the facts, and deciding that the Plaintiff was not bound by the arrangement contained in the deed of composition, either originally or by reason of any subsequent conduct, continued:—

But then comes a very grave and important question, whether, assuming that I am correct in the conclusion at which I have arrived, this action is nevertheless well founded. Now, the suit or action may be regarded in two points of view. It may be viewed as a foreclosure action coupled with a prayer for relief against the deed of composition, asking, in effect, that the Court will get that deed out of the way for the purpose of foreclosure. In that point of view it would be essentially a foreclosure action. But it may

(1) 7 D. M. & G. 43. (2) 2 Sw. 539.

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further be said that, even if foreclosure cannot be had, relief may be given to the extent of declaring the deed to be void, and directing it to be delivered up to be cancelled, on the ground that it is a cloud on the Plaintiff's title. Both these views have been suggested to me by Mr. *Kekewich*. I must consider, in the first place, whether the action can be maintained as a foreclosure action, that is to say, whether, when a mortgage has been made to three persons jointly, one of those three can foreclose the mortgage, making the other two Defendants to the action. It is admitted that no precedent can be produced for such a proceeding, and it appears to me that the inconveniences of it are manifold and manifest. In the first place, it would follow that you might have as many actions pending as there were mortgagees. Take the case, with which we are very familiar, of a mortgage for a large sum of money made to half a dozen persons as trustees for an insurance company, the name of the company not appearing on the face of the deed. You might have six foreclosure actions, one brought by each of the mortgagees, against the mortgagor, naming the other five as Defendants on the record. Then there are further questions which would arise at the hearing. In a foreclosure action you may have foreclosure or sale. How is the question, which it is to be, to be determined? Would the Plaintiff be *dominus litis* for this purpose, so that he could dictate to the other mortgagees what relief was to be had, or must there be a struggle between the co-mortgagees as to what the nature of the relief to be had should be? It appears to me that the inconveniences of such a course are very manifest. But then it is said that where there are several co-mortgagees one of them might have a bad reason for not desiring to foreclose, or might have no reason at all. He may be content to leave things as they are, and decline to join in the foreclosure action. Such questions undoubtedly have often arisen, and in all probability will often arise again, and they may have to be determined in some way. But I am of opinion that they must be determined in a separate and independent proceeding, and that the mortgagor is not to be harassed by conflicts and controversies between his mortgagees, but that the question whether an action for foreclosure shall or shall not be brought is not to be determined in the action for foreclosure itself. To mix up the question whether an action ought to be brought with that action itself seems to me inconvenient to

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the last degree, and upon that ground I come to the conclusion that the Plaintiff cannot maintain this action as a foreclosure action.

Can he then maintain it as an action for the purpose of having it declared that the deed of composition is void? On what title is that deed said to be a cloud? On the title of the Plaintiff and his co-mortgagees. But is that deed certainly a cloud on the title? The deed is one which is intended to give effect to a new contract—a novation. It is intended to give a new security from a new debtor. Whether it gives a better security or a worse than the old deed, I do not know. But I do know this, that in 1869, when the negotiation took place, Mr. *Luke* and his co-trustees all thought it was a good arrangement, and that it would be wise to accept the security of the new company, provided it could be legally done. This is not a case in which the deed sought to be set aside is unquestionably a cloud on the title of the Plaintiff in the sense of being an injury to the title. It may be, for aught I know, a great boon to the trust estate represented by the Plaintiff and his co-trustees. But, further than that, assuming that it is a cloud upon the title, can the Plaintiff sue alone? It appears to me clear that if the two trustees who did execute the deed are not bound by it in equity, they might alone, or certainly together with Mr. *Luke*, maintain an action to have it delivered up to be cancelled. The cases of *Underhill* v. *Horwood* (1), *Carew's Case* (2), and *Evans* v. *Bremridge* (3), certainly lead me to that conclusion. If I were to allow Mr. *Luke* to sue alone to set aside the deed, it appears to me that the same inconvenience would follow as I have already pointed out with regard to the foreclosure. You might have a conflict between the Plaintiff and those persons who are jointly interested with him in the estate, and into that conflict you would drag the person who claims the benefit of the deed. Again, supposing there were, as there are here, numerous parties who claim an interest in the trust estate, each of them might maintain a separate action, and to that action the person claiming the benefit of the deed must in all cases be a party. I am of opinion that it is expedient that the internal question, whether an action should be brought or not, should be litigated between the persons who are

(1) 10 Ves. 209. (2) 7 D. M. & G. 43.
(3) 2 K. & J. 174; 8 D. M. & G. 100.

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interested in the determination of that question. In the case of a trust estate it would undoubtedly be necessary to have all the *cestuis que trust* properly before the Court, and in the action so constituted the Court might determine between the various views taken by the trustees what would be proper to be done. But it would be a great inconvenience, a great hardship, to a mortgagor or a person claiming the benefit of an instrument, if I were to allow an intestine quarrel, between persons entitled to the mortgage money or the estate dealt with by the instrument, to be litigated in the same action as that in which the mortgage is sought to be enforced or the instrument to be set aside. On that broad ground I determine that the present Plaintiff cannot maintain this action.

I desire to make two other observations. One is this. It does not appear that Mr. *Luke* made any application to his co-trustees to join in the action; and when I asked the counsel for Messrs. *Browne* and *Sandys* whether they were willing to be placed as co-Plaintiffs upon the record, they declined so to be placed. The other observation is this, that what I have said with regard to the proper constitution of such actions does not apply necessarily, or perhaps at all, to cases in which one of several persons jointly interested is colluding with the principal Defendant, or to cases in which it may be necessary for the Court to intervene with unusual activity by way of giving protection to the property. But what I do determine is this, that in an action such as this, for foreclosure and setting aside a deed, the domestic quarrel whether such an action shall or shall not be brought ought to be determined separately, and that the person who claims the benefit of the deed, or who stands in the position of mortgagor is not to be harassed by controversies of the nature which have been here ventilated between persons who claim an interest as mortgagees. On these grounds I am compelled to decide against the Plaintiff, and to give judgment for all the Defendants with costs.

Solicitors for Plaintiff: *Janson, Cobb, & Pearson.*

Solicitors for Defendant Company: *Mayhew, Salmon, & Whiting.*

Solicitors for Defendants *Browne* and *Sandys*: *Sandys & Trevenen.*

Solicitors for tenant for life: *W. & A. Ranken Ford.*

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[1876 S. 96.]

Jan. 11, 12, 14, 15.

Trade-mark—Trade Name—Name of Place—Fraud—Injunction—Collateral Misrepresentation by Plaintiff.

The Plaintiff manufactured a fluid which he sold under the name of "*Aromatic Bitters*," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "*Angostura Bitters*," it having been originally manufactured at the town of *Angostura* in *Venezuela*. The name of this town was afterwards, by a decree of the state, changed to *Ciudad Bolivar*. After this change had taken place, the Defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "*Aromatic Bitters*," but, having been restrained in an English colony from using that name, he adopted the name "*Angostura Bitters*," and placed it upon the wrappers of his bottles, also registering his wrapper at *Stationers' Hall*. His wrappers were very similar to those of the Plaintiff, but they contained a statement that the fluid was prepared by the Defendant. After this the Plaintiff adopted the name "*Angostura Bitters*," and placed it upon his wrappers, and he brought an action against the Defendant, claiming an injunction to restrain him from imitating the Plaintiff's wrappers, and from using the name "*Angostura Bitters*." At the time when the action was brought the Plaintiff had ceased to carry on his manufacture at *Ciudad Bolivar*:—

Held, upon the evidence, that the Defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "*Angostura Bitters*," in case he should ever discover the Plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the Plaintiff's.

It was alleged by the Defendant that the Plaintiff was disentitled to relief, because, at the time of the trial, he was using wrappers which contained a misrepresentation. The Plaintiff did not begin to use those wrappers until after the action had been brought:—

Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the Plaintiff's title to relief.

Statement.

THIS action was brought to restrain the Defendants, Messrs. *Inglis & Wulff*, from selling any bitters in bottles enveloped in wrappers in imitation of the wrappers used by the Plaintiffs, or any other wrappers or labels having the name "*Angostura*"

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thereon, or so contrived as to represent the preparation offered for sale by the Defendants as being the cordial, known as "*Angostura Bitters*," manufactured and sold by the Plaintiffs.

Dr. *Siegert*, the father of the Plaintiffs, resided in the town of *Angostura*, in the republic of *Venezuela*. He discovered a secret for the composition of a fluid which he described as "*Aromatic Bitters*," and in 1830 established a manufactory at that place, and manufactured the fluid and sold it in large quantities in *England* and other countries. After Dr. *Siegert's* death, in 1870, the business was continued by the Plaintiffs. In May, 1846, the name of the town of *Angostura* was, by a decree of the state, changed to *Ciudad Bolivar*, but the town continued up to the time when the action was commenced to be generally known in *England* by its old name. Dr. *Siegert's* fluid was sold by him, and afterwards by the Plaintiffs, in bottles enveloped in paper wrappers, upon which was printed, in parallel columns in three languages, Spanish, English, and German, a description of the virtues of the preparation, and of the way in which and the purposes for which it was to be used. The heading of the centre column, which was in English, was this:

"*Aromatic Bitters*,
"Prepared by Dr. *Siegert* at *Angostura*.
(Now *Ciudad Bolivar*.)

The headings of the other columns were similar.

Beneath the three parallel columns was a similar description, with a similar heading, in French.

The fluid obtained a large sale in *England* and other countries, and became generally known in the English market as "*Angostura Bitters*," though Dr. *Siegert* himself never described it by that name, nor did the Plaintiffs make use of that name until (as will be presently stated) the year 1875.

In the year 1870 a Dr. *Teodoro Meinhard*, who had for some years previously manufactured bitters, prepared from a recipe discovered by himself, at *Upata*, in *Venezuela*, removed his manufacture to *Ciudad Bolivar*. He sold his preparation in bottles which resembled in shape those used by the Plaintiffs, and which were enveloped in paper wrappers having upon them a description in three languages, Spanish, English, and German, arranged in three

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parallel columns, a fourth description in French being printed underneath the others. The heading of the centre column, which was in English, was this:

"*Aromatic Bitters*,
"Prepared by *Teodoro Meinhard*,
"*Ciudad Bolivar*, formerly *Angostura*."

The headings of the other columns were similar.

It was admitted that *Meinhard's* preparation was entirely different from that of the Plaintiffs.

In the year 1874 the Plaintiffs instituted proceedings in the Supreme Civil Court of *Trinidad* against one *William Ehlers*, who was acting as the agent of *Meinhard* in *Trinidad*, and on the 3rd of February, 1874, an interlocutory order was made restraining *Ehlers*, until the hearing of the cause, from selling or exposing for sale, or from exporting, any composition put up in bottles enveloped in wrappers having printed thereon the name "*Aromatic Bitters*," and a description of the uses, properties, and qualities thereof, in imitation of the wrappers used by the Plaintiffs, or any other wrappers so contrived or expressed, as by colourable imitation or otherwise, to represent the composition sold by the Defendant as being that manufactured and sold by the Plaintiffs. *Ehlers* afterwards submitted to a perpetual injunction. After this *Meinhard* made some alterations in his wrappers, but he still continued to print upon them a description in three languages, in parallel columns, with a similar description in French underneath. The heading of the centre column of the altered wrappers, which was in English, was this:

"*Angostura Bitters*,
"Prepared by *Teodoro Meinhard*,
"*Ciudad Bolivar*, formerly *Angostura*."

The headings of the other columns were similar, and diagonally across the three columns there was printed in large red letters the words "*Angostura Bitters*." This wrapper was registered at *Stationers' Hall*.

Early in the year 1875 the Plaintiffs removed their manufacture to *Port of Spain*, in *Trinidad*, and they then made an alteration in their wrappers. The description was still printed in

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Spanish, English, and German, in three parallel columns, underneath which was a description in French.

The heading of the centre column, which was in English, was this:

"*Aromatic Bitters,*
or
"*Angostura Bitters,*
"Prepared by Dr. *Siegert*, at *Angostura.*"
"(Now at *Port of Spain, Trinidad.*)"

The headings in the other languages were similar.

Before this the Plaintiffs had not used the words "*Augostura Bitters*" upon their wrappers.

On the 9th of March, 1876, the Plaintiffs commenced this action against Messrs. *Findlater & Co.*, who were, as they alleged, selling a composition described as "*Angostura Bitters,*" contained in bottles enveloped in wrappers which were an imitation of the Plaintiffs' wrappers. The Defendants *Inglis & Wulff* then wrote to the Plaintiffs, admitting that they had sold the articles in question to *Findlater & Co.*, and were answerable for so doing, and requesting that the action might proceed against them. *Inglis & Wulff* were accordingly made Defendants, and *Findlater & Co.* were dismissed. *Inglis & Wulff* were the agents in *England* of one *A. F. Nagel*, of *Hamburg*, who was the general agent for the sale in *Europe* of *Meinhard's* bitters. The fluid sold by *Inglis & Wulff* was *Meinhard's*, and it was sold in bottles enveloped in wrappers of the form which he adopted after the injunction had been obtained against *Ehlers* in *Trinidad.*

The Plaintiffs alleged that these wrappers were an intentional and fraudulent imitation of their own wrappers; that the Plaintiffs' preparation had been long well known to the trade and the public in *England* and elsewhere as "*Angostura Bitters*"; that the introduction of the word "*Angostura*" into the wrappers of the bottles sold by the Defendants was absolutely unnecessary, except for the purpose of passing off the composition sold by them as that of the Plaintiffs; and that by the use of such wrappers the ordinary public were liable to be misled, and had, in fact, been misled, into purchasing the composition sold by the Defendants instead of the Plaintiffs' preparation. And the Plaintiffs claimed an injunction to the effect already mentioned.

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Statement.

By their statement of defence the Defendants said that it was in consequence of their containing, or being supposed to contain, *Angostura* bark, as well as from the place at which they were manufactured, that bitters manufactured at *Ciudad Bolivar* or *Angostura* had for many years been known as "*Angostura Bitters.*" They denied that the Plaintiffs' bitters had become universally known and distinguished as "*Angostura Bitters,*" or that the Plaintiffs had any exclusive right to use that term. On the contrary, they said that *Meinhard* was the only manufacturer of bitters who then carried on such manufacture at *Ciudad Bolivar* or *Angostura*, and that he claimed the exclusive right to use the term "*Angostura Bitters.*"

This was the trial of the action.

The Defendants admitted that they were indemnified against the costs of the action by *Meinhard.*

It appeared that after the commencement of the action the Plaintiffs altered again the form of the wrapper which they used in *England.* It was alleged by the Defendants that this new wrapper contained misrepresentations.

Argument.

Cookson, Q.C., and *H. Fellows*, for the Plaintiffs:—

It is clear that the Defendants began in 1874 to use the name "*Angostura Bitters*" upon their wrappers with the view of passing off their manufacture as that of the Plaintiffs; or, at any rate, that the use of that name is likely to have that effect; and, apart from the use of that name, the general form and design of the Defendants' bottles and wrappers closely resembles the form and design of those of the Plaintiffs, and is calculated and intended to deceive. And we have proved some instances of actual deception. The *Glenfield Starch Case*, *Wotherspoon* v. *Currie* (1), and *Singer Manufacturing Company* v. *Wilson* (2), are authorities in our favour.

[FRY, J.:—The name "*Angostura Bitters*" has been used to signify the particular article manufactured by the Plaintiffs, and it has only indirectly denoted the maker of the article, because the Plaintiffs have been the only makers of that article. But any person who could discover the secret of the manufacture would

(1) Law Rep. 5 H. L. 508. (2) 2 Ch. D. 434.

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have a right to make and sell the same article, the Plaintiffs having no patent right. How, then, can I restrain the Defendants absolutely from using the word "*Angostura*"? If they should even make the same thing as the Plaintiffs, they would surely have a right to call it "*Angostura Bitters.*" It is not like the *Singer Case*, where the name "*Singer*' originally indicated the maker of the machine, nor is it like the *Glenfield Starch Case*, where "Starch" was the *genus* and "*Glenfield*" was the *species*, and shewed that "*Glenfield Starch*" was made by a particular manufacturer.]

Here the Defendants' article is admittedly a different thing from the Plaintiffs', and the calling it by the name which the Plaintiffs' article has acquired in the market is a badge of fraud: *Seixo* v. *Provezende* (1). It is not conclusive in the Defendants' favour that *Meinhard* is stated on the wrapper to be the manufacturer: *Wotherspoon* v. *Currie* (2); *Singer Manufacturing Company* v. *Wilson* (3). We are entitled, at any rate, to an injunction against the use of the words "*Angostura Bitters*," or of the word "*Angostura*" in the way in which the Defendants have used it, or in any other way calculated to mislead the public. An important element in the case is the fact that the name of the town *Angostura* had been legally changed before *Meinhard* commenced his manufacture there.

We are entitled to an order similar to that which was made in the *Apollinaris Water Case, Apollinaris Company* v. *Edwards* (4).

[FRY, J.:—There is this distinction: *Apollinaris Water* was a natural product, whereas "*Angostura Bitters*" is an artificial compound.]

The value of the name consists in the general public use of it to describe the article, whether the name was originally given by the vendor or not.

[They referred also to *Radde* v. *Norman* (5); *McAndrew* v. *Bassett* (6); *Raggett* v. *Findlater* (7); *Broadhurst* v. *Barlow* (before Vice-Chancellor *Wickens*, Nov. 21, 1872).]

(1) Law Rep. 1 Ch. 192.
(2) Ibid. 5 H. L. 508.
(3) 2 Ch. D. 434.
(4) Seton's Decrees, 4th Ed. vol. i. p. 237.
(5) Law Rep. 14 Eq. 348.
(6) 4 D. J. & S. 380.
(7) Law Rep. 17 Eq. 29.

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North, Q.C., and *J. Cutler*, for the Defendants:—

The material point in the case is the use of the words "*Angostura Bitters.*" They only mean bitters made at *Angostura*, and the evidence shews that, though the name of the town has been legally changed, the town is generally known, at any rate in *England*, by the old name; and the old name still appears in the best maps. It is not like the *Singer Case*, where the Plaintiff's name had been used. That is an important distinction with regard to the question of fraud.

[FRY, J.:—I am disposed to think that in the whole get-up of your goods there has been an attempt to make them like the Plaintiffs'.]

We are quite ready to alter the form of our wrappers. But the real question is the use of the word "*Angostura*," and that we claim the right to use. We began to use it before the Plaintiffs. There was no fraud in this.

Of course we are not entitled to use the word for the purpose of representing our article as that of the Plaintiffs, but we have not done that. Our article is made at *Angostura*, and our wrappers clearly state who the manufacturer is. No person who uses ordinary care can be deceived. The evidence shews that there are various kinds of bitters known in the trade, and several of them are called by the names of the places where they are made. The fact that the Plaintiffs are the sole makers of a particular article does not give them a monopoly of anything else which may be properly described by the same name as that by which their article has become known. There is no representation that our article is that of the Plaintiffs. When the public asked for "*Angostura Bitters*" they did not ask for the Plaintiffs' bitters.

[FRY, J.:—When you add the fact that the Plaintiffs were the sole manufacturers of the article, it is clear that the public meant the Plaintiffs' bitters, though this was not actually present to the mind of the purchaser.]

But as soon as it became known that some one else was making "*Angostura Bitters*," a purchaser must know that in asking for "*Angostura Bitters*" he will not necessarily get the Plaintiffs' article.

[FRY, J.:—The common usage by men of business at the place

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itself after the alteration of name had been made is very material upon the question whether any man of business desiring to act honestly would call his goods "*Angostura*" after the name had been changed.]

Argument.

If we are entitled to use the name to describe the same article as that which the Plaintiffs make, why not to describe another similar article, so long as we do not represent it to be the Plaintiffs'? If the Plaintiffs claim the name as their trade-mark, they are entitled to the use of it absolutely for the particular article which they make: *McAndrew* v. *Bassett* (1). The Plaintiffs have asked too much, and ought, therefore, to fail in this action.

Then, again, they have made misrepresentations in the last wrappers which they have adopted, and this disentitles them to relief: *Pidding* v. *How* (2); *Leather Cloth Company* v. *American Leather Cloth Company* (3); *Ford* v. *Foster* (4); *Cheavin* v. *Walker* (5).

[FRY, J.:—This wrapper was introduced after the action had been commenced. Is there any authority that a fraud committed subsequently to the commencement of the action will deprive the Plaintiff of his right?]

The Plaintiffs claim the continuous use of a wrapper substantially the same. They have adduced no sufficient evidence of actual deception: *Cope* v. *Evans* (6).

Judgment.

FRY, J., after stating the nature of the case and the change of the name of the town of *Angostura*, continued:—

Now there has been a great contest as to the effect of that change, that is to say, how far it has taken effect in public usage, that being material with regard to the good faith of *Meinhard* in adopting the name of *Angostura*. Upon the evidence before me I come to the conclusion that, in the country itself and among business men, the name of *Angostura* has gone out of general use, and that the name of *Ciudad Bolivar* has come into general use, and has supplanted the other name.

I bear in mind that there is evidence that in *England* the place

(1) 4 D. J. & S. 380.
(2) 8 Sim. 477.
(3) 11 H. L. C. 523.
(4) Law Rep. 7 Ch. 611.
(5) 5 Ch. D. 850.
(6) Law Rep. 18 Eq. 138.

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is still more generally called *Angostura*, but that circumstance does not suffice, as we know that old names often survive at a distance when they are abandoned at the place of their most common use. That is a phenomenon which, as anybody who is at all acquainted with family life knows, often happens with regard to familiar names. Therefore I come to the conclusion that a man of business there, dealing in the ordinary way, would, at the time when *Meinhard* set up his business there, have described the town as *Ciudad Bolivar* and nothing else. [His Lordship then referred to some of the other facts and to the granting of the injunction in *Trinidad*, and continued:—]

After the granting of that injunction *Meinhard* assumed the word "*Angostura*," as the description of the bitters which he sold. It becomes important therefore to consider what was the history of this word "*Angostura*" as applied to bitters. The original application of the word to the bitters of Dr. *Siegert* was natural, because they were made in the town of *Angostura*, and it appears from the evidence that after their introduction into *England*, in 1863, "*Angostura Bitters*" was used for many years in *England* as descriptive of them. In fact, I cannot on the evidence come to any other conclusion than that, from the time of their introduction in 1863 down to the present time, the popular name of the Plaintiffs' bitters in this country has been "*Angostura Bitters*." At the same time, it must be borne in mind that the Plaintiffs had never adopted the name "*Angostura Bitters*" in their own description down to the assumption of it by *Meinhard* in 1874. Therefore the matter stood in this way when the injunction was granted by the Court of *Trinidad*: there was one name which the Plaintiffs' firm had put upon their bitters, and there was another name which, at any rate in *England*, the public had attached to them, and, being restrained to a certain extent in the use of the name which appeared on the Plaintiffs' bitters, *Meinhard* was ingenious enough to adopt the other name by which they were known in the market. [After referring to some of the other facts, His Lordship continued:—]

This being the history of the proceedings of the two firms, the substantial question which in my opinion arises is this, whether the wrappers used by *Meinhard*, and the general form in which

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his bitters are made up, have been adopted by him for the purpose of representing that his goods are the goods of the Plaintiffs, and whether those wrappers and that general form are calculated to produce that effect. That seems to me to be the main question which I have to try.

Now, in trying that question, the first step which I have to take is to compare the things themselves. I have them before me, and no one can look at the two articles without seeing a great similarity in their "get up," if I may use that expression. The bottles are of very much the same form and size, the sealing wax is closely alike in colour, and in general effect the two articles are exceedingly alike. Then when I compare the wrappers, the intention is brought to my mind irresistibly. [His Lordship referred to characteristics of the wrappers.]

It is true that the letters printed on the wrappers are not identical in form. It is true that *Meinhard's* wrapper has the words, "Prepared by *Teodoro Meinhard*" sufficiently apparent upon it, though not very prominently, and that the Plaintiffs' wrapper has the words "Prepared by Dr. *Siegert*." But, notwithstanding this fact, the two wrappers are so alike that in my judgment the one is calculated to look like the other, and does so. The mere fact that the name of the maker is given is not sufficient to overcome the effect of identity in other respects, as is clear from the authorities. The two cases of *Wotherspoon* v. *Currie* (1) and *Singer Manufacturing Company* v. *Wilson* (2) shew that the mere presence of the name of the manufacturer is not conclusive that there is no attempt to palm off the goods as those of the rival manufacturer.

Another point which suggests itself to my mind is this: Is there any reason in the nature of things, in the character of the business, or the character of the product, which should produce this community—I might almost say this identity—of general form, in the absence of a desire to deceive. No such reason has been assigned by any of the witnesses, though I have called the attention of more than one witness to the point, and the Defendants' counsel have been unable to give any reason for the community of form, except it be a desire to deceive. It must be borne in mind that the form of these bottles is peculiar. It does not

(1) Law Rep. 5 H. L. 508. (2) 2 Ch. D. 434.

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appear that, so far as is known to any of the merchants in large business who have given evidence before me, bottles of similar form are used for any other liqueur, cordial, or bitter with which they are acquainted. Then, again, there is the fact, to which I have already adverted, that by the injunction in *Trinidad, Meinhard* felt himself constrained to abandon the word "*Aromatic*," and he at once assumed the use of the word "*Angostura*," which, as I have pointed out, had been used by the public to describe the Plaintiffs' goods at an earlier period. Further than that, I confess I doubt whether the word "*Angostura*," if it was meant to describe the town, was used *bonâ fide* by *Meinhard*, because I feel that if he had been acting *bonâ fide*, he would have used the name "*Ciudad Bolivar*" for that purpose; and if he asks me to believe that he used the name "*Angostura*" in 1874 because he was carrying on business in that town, I cannot accept his explanation. I come, therefore, to the conclusion that *Meinhard* had a design to induce people to believe that the goods sold by him were the goods of the Plaintiffs. I have had before me certainly one, but as it appears to me, two cases in which a skilled person, desiring to purchase the Plaintiffs' bitters, has had supplied to him the bitters made by *Meinhard*. Further than that, I have had the evidence of several persons who are skilled in these matters that *Meinhard's* bottles would be likely to deceive them, notwithstanding the difference in the name of the maker upon them. I think, therefore, that there is sufficient evidence of actual deception of persons well acquainted with this class of goods.

Then the next point set up by the Defendants is this, that there are misrepresentations in the wrapper now used by the Plaintiffs.

I cannot see that there is in fact anything in that wrapper amounting to a fraudulent misrepresentation by reason of which I ought to debar the Plaintiffs from any right they would otherwise have. Further than that, it must be borne in mind that these alleged misrepresentations were made, if made at all, in a wrapper not composed till six or seven months after the institution of the action, viz., in October, 1876, and I am at a loss to see how, even supposing that they were fraudulent misrepresentations, they could be a bar to the Plaintiffs' right of action. It seems to me that the case of *Ford* v. *Foster* (1) is decisive on that point. There it will

(1) Law Rep. 7 Ch. 611.

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be recollected there were misrepresentations by the Plaintiff which were held by the Court to be collateral, that is to say, they were in documents other than the trade-mark which was then in dispute, and in the decision of the Lord Justice *Mellish* I find these observations (1): "I am, therefore, of opinion that an action at law could have been maintained in this case. And we are in the same position now as if, before *Sir John Rolt's Act*, which altered the rule of this Court, an injunction had been refused, with leave to the Plaintiff to bring an action at law, and that action had been tried and a verdict obtained for the Plaintiff, and the Plaintiff were now before the Court asking for his injunction. Now, is the injunction to be granted or not? It appears to me in this case that the injunction must be granted, unless it can be held that it is a case in which a Court of Equity would grant an injunction to restrain the Plaintiff's action; because it cannot be right, if the Plaintiff is allowed to maintain his action, that he should be obliged to bring perpetual actions at law instead of having his injunction in this Court." "All the authorities," said his Lordship (2), "tend in that direction, and seem to hold that, if an action at law will lie, there will be a remedy in this Court by injunction. Indeed, I do not see what equitable right the Defendant could have to restrain such an action. He is simply a person who has committed a fraud himself, and who has no equitable right whatever, and the only decision which can be cited as an authority is *Leather Cloth Company* v. *American Leather Cloth Company* (3), where, no doubt, Lord *Westbury* and Lord *Kingsdown* appear to say that false representations of this kind might be an answer to a suit in equity. But that was plainly a case where the misrepresentation was in the trade-mark or label itself, and I have carefully read through the judgments of Lord *Kingsdown* and Lord *Westbury*, and it appears to me that they had simply that question before them, and they had not at all present to their minds the question which we have to decide, namely, whether a collateral misrepresentation would be an answer to an action at law, and if it be not an answer to an action at law, whether it could be an answer to a suit in equity." Now it does appear to me that if an action had been brought in March,

(1) Law Rep. 7 Ch. 632. (2) Law Rep. 7 Ch. 633.
(3) 11 H. L. C. 523.

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1876, for damages for the fraudulent acts of *Meinhard* in respect of these goods, and had not been tried till November, 1876, it would have been impossible for the Defendants to have alleged a fraud by the Plaintiffs in October as a bar to the action, and, if it would not be a bar to an action for damages, it cannot be a bar to an action for an injunction.

It was originally suggested that I should restrain the use of the word "*Angostura*" absolutely, and that was sought by the statement of claim. I took an opportunity of pointing out the difficulty I should have in doing this. The Plaintiffs have been for many years, so far as it appears, the sole makers of these particular bitters, which have been made according to a recipe possessed by them but never published. Just in the same way *Meinhard* has a recipe which he has never divulged, which he does not assert to produce the same thing as that which is made by the Plaintiffs, but which produces a different bitter. The two are perfectly distinguishable, both in colour and taste. I cannot say that *Meinhard* may not, if he can, make a bitter identical with the Plaintiffs', and, if he does so, I cannot prevent him from selling it as "*Angostura Bitters.*" It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species and the name of the class will be the same. Because persons in *England* have called the actual thing made "*Angostura Bitters,*" the term has been applied to the Plaintiffs' make. It is quite true that, to a person who knows that these bitters are made only by the Plaintiffs, the use of the term "*Angostura Bitters*" carries with it a reference to the Plaintiffs' make, but the expression is really used to denote the thing itself; that is what it primarily denotes. The reference to the maker only arises when there is superadded to the thought of the thing the thought of the person who makes it; a thought which seldom arises in the mind of the purchaser, who cares nothing about the maker, but only about the thing which he is buying.

There remains, however, the question whether I can restrain

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the use of the words "*Angostura Bitters*" when they are used in such a way as to produce the belief on the part of the purchaser that *Meinhard's* bitters are the bitters made by the Plaintiffs. The point has been put very prominently forward on both sides, for *Meinhard* claims, by virtue of his first use of the words "*Angostura Bitters*" on his goods, and also by his entering his wrapper at *Stationers' Hall* before the Plaintiffs adopted the use of those words, to be entitled to the exclusive use of the term "*Angostura Bitters.*" I do not think that claim can be maintained. I think that, so far as *England* is concerned, the term "*Angostura Bitters*" means a bitter of the kind which is made by the Plaintiffs. The bitter made by *Meinhard* is not of that kind, but is distinct from it. I think, therefore, that when *Meinhard* used the words "*Angostura Bitters,*" as applied to the bitters which he made, he did so as part of that scheme of fraud of which I have found him guilty. I think I am at liberty to restrain his agents from such a use of those words. I disclaim any intention of binding the world down to one particular meaning of the words "*Angostura Bitters,*" or of preventing the Defendants from selling if they can, bitters like the Plaintiffs', or from selling any other bitters, but I am entitled to restrain them from deceiving the public. The injunction will, therefore, be to restrain the Defendants, their servants and agents, from using the words "*Angostura Bitters,*" or the word "*Angostura,*" on any bitters or other fluids contained in bottles, not made by the Plaintiffs, so as to induce the belief that such bitters or fluids are made by the Plaintiffs, and further, from selling or offering for sale any bitters or other fluids in the bottles, in the wrappers, and in the general form in which the Defendants were selling the bitters called by them "*Angostura Bitters*" at the commencement of this action, or in any other wrappers or form contrived or designed to represent and induce the belief that the bitters or fluids sold by the Defendants, and not made by the Plaintiffs, are the goods of the Plaintiffs. The Defendants must pay the costs of the action.

Solicitors for Plaintiffs: *Stibbard, Gibson, & Co.*

Solicitor for Defendants: *L. Hand.*

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[1876 S. 439.]

Jan. 16, 17, 18, 19, 21, 22.

Landlord and Tenant—Waste—Reasonable Use of Demised Premises—Covenant by Landlord to keep in Repair—Construction—Implied License to enter—Proviso for Cesser or Abatement of Rent—"Inevitable Accident."

Semble, that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner, having regard to the class of tenement to which they belong, is not waste.

In a lease of a newly constructed grain warehouse there was a covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it, in (as the Court held upon the evidence) a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:—

Held, that the lessee had not been guilty of waste:

Held, also, that the lessor was bound under his covenant to put the walls and main timbers in good repair, having regard to the class of buildings to which the warehouse belonged, and not merely to the condition of the particular building:

Held, also, that the covenant implied a license by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs.

The lease contained a proviso that, in case the warehouse, or any part thereof, should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent, or a just proportion thereof, should cease or abate so long as the premises should continue wholly or partly untenantable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use and occupation of the whole or a part of the premises, and he claimed an abatement of rent under the proviso:—

Held, that the words "inevitable accident" imported something *ejusdem generis* with what had been previously mentioned, and did not apply to that which, though not avoidable so far as the lessee was concerned, was not in its nature inevitable, but resulted from the default of the lessor, and that the lessee was not entitled to an abatement of rent.

Statement.

THE Plaintiff was the owner of a large warehouse in *Hull*, known as the *Crown Warehouse*. At the date of the execution of the lease to be presently mentioned the warehouse had been recently

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built, and it was intended for the storage of grain, and other goods of a similar nature. The Defendant, who was a wharfinger, was the first tenant.

By an indenture dated the 18th of April, 1873, the Plaintiff, in consideration of the rent and covenants thereinafter respectively reserved and contained, demised to the Defendant the warehouse and an adjoining building, and a quay or wharf in front thereof, from the 1st of May, 1873, for the term of fifteen years, at a yearly rent of £1400. There was a proviso that "in case the said warehouse and building, or any part thereof respectively, shall at any time during the said term be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident, then the said yearly rent hereby reserved, or a just proportion thereof, according to the amount of injury which the said premises shall actually sustain, shall cease or abate, so long as the same premises shall continue wholly or partly untenantable or unfit for use and occupation in consequence of such destruction or damage." There was a covenant by the lessor for quiet enjoyment by the lessee "subject to the rent and covenants herein reserved and contained" on his part, and a further covenant by the lessor that he would "from time to time, and at all times during the continuance of the said term, keep the roof, spouts, and main walls and main timbers of the said warehouse in good repair and condition."

Soon after the execution of the lease the Defendant entered upon the demised premises, and erected machinery and other appliances, and in August, 1873, he commenced storing grain there.

On the 28th of December, 1873, one of the beams which supported the upper floor of the warehouse broke. The floor was not then loaded. In February or March, 1874, the east external wall shewed signs of sinking and bulging outwards, and a general sinking of the east side of the warehouse appeared. The Plaintiff then had the building inspected, and afterwards executed substantial repairs, the whole of the east wall being underpinned. In July, 1875, the west or river wall of the warehouse shewed signs of giving way and bulging outwards. The Plaintiff laid out a considerable sum in repairs. While the repairs were being executed the Defendant was unable to make use of either the

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whole or a part of the premises for the purposes of his business, but he continued to pay rent, though he did so under protest, and without prejudice to his rights.

The action was commenced in November, 1876. The Plaintiff, by his statement of claim, alleged that "the Defendant has from time to time stored on each of the floors grain, seed, and other goods in excess of what is reasonable and proper, having regard to the strength of the buildings and the nature of the ground on which they stand, which abuts on the river *Hull*. The goods stored have also been improperly distributed over the buildings, so that some floors and parts of floors have from time to time had to bear weights disproportionate to those borne by other floors and other parts of the same floors. This has caused an unreasonable strain on the walls and foundations of the buildings. By reason of such excessive and improper storage the stability of the buildings has been seriously affected, and the walls and foundations have been seriously injured. The Plaintiff has already been obliged to expend several thousand pounds in repairs, which would have been altogether unnecessary if the buildings had been used by the Defendant in a reasonable and proper manner." It was further alleged that the Defendant threatened and intended to continue to store goods in the buildings in the same way as theretofore. And the Plaintiff claimed an injunction and damages.

The Defendant, by his statement of defence, denied that he had ever stored goods in the warehouse in an unreasonable or improper manner, and he denied that the buildings had been in any way injured by reason of improper storage on his part. On the contrary, he said that the buildings had been always used by him in a reasonable and proper manner, and that the repairs which the Plaintiff had executed were rendered necessary by the originally faulty construction of the buildings, and not by any improper use of them by the Defendant.

And, by way of counter-claim, the Defendant said that at the time of the granting of the lease the buildings appeared and were represented by the Plaintiff to be of sound construction, substantially built, and fit for use and occupation as a warehouse. The fact, however, was, as the Defendant afterwards discovered,

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that the Plaintiff had caused the buildings to be constructed in a faulty manner, and that no proper foundations were put in. The injury which afterwards took place was due entirely to the faulty construction of the buildings, and could not have been avoided by any skill or foresight on the part of the Defendant, and the Defendant claimed an abatement of rent to the amount of £900 in respect of the period during which the buildings were wholly or partly unfit for use and occupation, and damages to the amount of £300 for breach of the Plaintiff's covenant to keep the main walls in good repair and condition.

By his reply the Plaintiff joined issue on the statement of defence, and denied the statements contained in the counter-claim. This was the trial.

Argument.

Kekewich, Q.C., and *Hornell*, for the Plaintiff:—

The Defendant has used the building unfairly, and has put the corn in heaps. He has no right to destroy the building, and it is waste to do so.

The law applicable to waste is laid down in *Williams' Saunders* (1); *Yellowly* v. *Gower* (2); *Corporation of London* v. *Hedger* (3); *Harnett* v. *Maitland* (4); *Queen's College, Oxford*, v. *Hallett* (5). Any destruction of the property is waste. The Defendant says that the building is not of proper strength, but he must not destroy it. There is no implied warranty of fitness for use by the lessor of a house or land, though there is in the case of a furnished house: *Smith* v. *Marrable* (6); *Wilson* v. *Finch-Hatton* (7); *Hart* v. *Windsor* (8); *Sutton* v. *Temple* (9).

[FRY, J., referred to *Erskine* v. *Adeane* (10).]

Arden v. *Pullen* (11); *Chappell* v. *Gregory* (12); *Murray* v. *Mace* (13).

[FRY, J.:—Does not the Plaintiff's covenant to keep the main

(1) Ed. 1871, vol. ii. p. 644 *et seq.*
(2) 11 Ex. 274.
(3) 18 Ves. 355.
(4) 16 M. & W. 257.
(5) 14 East, 489.
(6) 11 M. & W. 5.
(7) 2 Ex. D. 336.
(8) 12 M. & W. 68.
(9) Ibid. 52.
(10) Law Rep. 8 Ch. 756.
(11) 10 M. & W. 321.
(12) 34 Beav. 250.
(13) 8 Ir. C. L. Rep. 396.

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walls of the building in good repair imply that he is to put them in good repair to begin with?

Murphy, Q.C., for the Defendant, referred to *Payne* v. *Haine* (1).]

White v. *Nicholson* (2).

The lease amounts to a contract for fair use, but the evidence shews that the building has been unfairly used, and it is just the same as if the damage was malicious. When the Defendant saw that the floor would not bear the weight he ought to have desisted. If the building is too weak for the purpose for which the Defendant wants it he should throw up the lease.

Murphy, Q.C., *North*, Q.C., and *Macnaghten*, for the Defendant:—

We do not dispute the authority of the cases cited, but we say that the Defendant has committed no waste; he has only used the building reasonably and properly in the mode which was contemplated by both parties. Such a use is not waste, even if it destroys the building. The evidence shews that the use has been reasonable according to the nature of the property. We rely also on the Plaintiff's express covenant to keep in repair the main walls and timbers of the building: that amounts to a warranty, and obliges him to put them in good repair if they were not in good repair when the lease was granted: *Payne* v. *Haine*; *Easton* v. *Pratt* (3). It must be put in that which is a good state of repair having regard to the class of property to which it belongs. The Defendant has done nothing inconsistent with the contract between the parties; there has been no wanton destruction.

With regard to the counter-claim, the Defendant is entitled to an abatement of rent, for the words "other inevitable accident" include that which, so far as the Defendant's acts are concerned, is an inevitable accident, that which arises from the default of the Plaintiff in fulfilling his covenant to keep the buildings in repair.

[FRY, J.:—How can the necessary result of the condition of the buildings be called an "inevitable accident"?]

(1) 16 M. & W. 541. (2) 4 Man. & G. 95.
(3) 2 H. & C. 676.

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The defect was a latent one, and arose from the landlord's own default; the result was "inevitable" unless he did something to prevent it.

The Defendant is also entitled to damages, because the evidence shews that an unreasonable time was occupied in doing the repairs. Indeed, it may be said that any entry by the landlord is a breach of the covenant for quiet enjoyment.

Kekewich, in reply and in answer to the counter-claim:—

The evidence shews an unreasonable user by the Defendant. The test is the condition of the particular building, not the ordinary strength of the class to which it belongs. This building was only intended for a light warehouse. The Plaintiff's covenant to repair does not extend to inherent defects in the building. As to the abatement of rent, the words "inevitable accident" must mean something *ejusdem generis* with what has gone before; they mean the same thing as an "act of God": *Nugent* v. *Smith* (1).

[FRY, J., referred to *Nichols* v. *Marsland* (2).]

Judgment.

FRY, J., after stating the facts, continued:—

The question which arises upon this state of facts is this, Was the injury which the building has sustained due to an improper user by the Defendant, as is alleged by the Plaintiff, or was it due to the improper construction by the Plaintiff? Or, to express it a little more exactly, what I have to consider, according to my view, is this, Did the Defendant use the warehouse in a reasonable and proper manner, having regard to the class of tenement of which it was one, that is to say, a grain warehouse of the dimensions which it had? That appears to me to be the question which I have to determine. I think it is proved that a representation was in fact made by the Plaintiff that the warehouse would hold (that is, would safely carry and contain) 60,000 quarters of wheat. It does not appear to me that the evidence as to representations is of serious importance to the decision of the case. I look upon it only as confirming me in the conclusion to which I have come, that, from the very nature of the building, a person taking it

(1) 1 C. P. D. 423. (2) 2 Ex. D. 1.

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would expect to be able to use it for the storage of a large quantity of wheat or other goods. It is said that if the building was used in any manner which produced injury, although that user might have been a proper and reasonable user of the class of tenement to which the building belonged, nevertheless, if it produced the destruction of the tenement or a serious injury to its stability, waste was committed. It appears to me that this proposition is a very serious one, and cannot be maintained without great difficulty. It would be a very serious thing to hold that if a man chooses to construct a house in such a flimsy manner as that the moment, for instance, a bedstead is put up in it the timbers give way, and the house comes down, that coming down of the house resulting from the putting into it of the ordinary furniture required for its occupation would be, on the part of the tenant, waste. Yet the argument of the Plaintiff's counsel has gone to that extent. It is admitted that no authority can be produced for the proposition, but reliance is placed upon the general expressions in which waste has been defined, such as anything which leads to the destruction of the tenement. If it were necessary for me to determine the point, I should be prepared to hold that no user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste. But it is not necessary now to determine that question, because there is in the present case an express covenant by the lessor that he will during the term "keep the main walls and main timbers of the warehouse in good repair and condition." Upon that I make two observations. The first is that, in my judgment, the covenant obliges the lessor to put the main walls and main timbers into good repair and condition, if they were in bad condition when the lessee took the warehouse. The second is this, that the question, what is "good repair and condition," is to be viewed having regard to the class to which the demised tenement belongs, and not with regard to that tenement itself alone. If it were not so, I should be landed in this absurdity. Assuming that the main walls and main timbers were in bad repair when the lessee took the warehouse, and assuming that the "good repair" is to be construed with regard to the particular subject-matter, good would mean bad, and the covenant to keep in good repair would

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be satisfied by keeping the tenement in bad repair. Not only is that opposed to common sense, but, if authority were necessary, it is opposed to the decision in *Payne* v. *Haine* (1), where it was held with regard to a house in bad condition, that a covenant to keep it in good condition required that it should be put into good condition, which would not be the case if the covenant were read with reference to the condition of the demised tenement itself. [His Lordship then reviewed the direct evidence as to the Defendant's user of the property, and continued:—]

Weighing the evidence as best I can, I come distinctly to the conclusion that the Defendant did use the warehouse in a reasonable and proper manner. Nay, I go further, and say that I believe he attended with great propriety to suggestions made by the Plaintiff that the danger was caused by the manner in which he was loading, and did his best to load rather lightly than over much. [His Lordship then referred to the indirect evidence, and continued:—]

If I were bound to come to a conclusion on this conflicting evidence, I should find for the Defendant and not for the Plaintiff. It is enough, however, for me to say that, reviewing the whole of the evidence, and having given to it the best attention I can, I have come to the conclusion that the injury which the building has sustained may well be attributed to other causes than an improper user by the Defendant, and I cannot come to the conclusion that the Defendant has used it improperly.

The result is, that the Plaintiff, having taken upon himself the burthen of shewing that the Defendant has, by his mode of using the warehouse, committed waste, has in my judgment failed to support the burthen, and consequently his action must be dismissed with costs.

There remain two other questions which are raised by the counter-claim. The first of them arises in this way: The Plaintiff has done extensive repairs, the execution of which has occupied a considerable time. The result was that for four months the Defendant could not take any goods into the warehouse; and besides that, portions of the warehouse which the Defendant would otherwise have used, were for a further period occupied by the

(1) 16 M. & W. 541.

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Plaintiff's workmen, and the warehouse therefore could not receive the Defendant's goods, and for this he claims an abatement of rent under the proviso in the lease. He says that the injury so happening to the building was an inevitable accident within the meaning of the proviso, and consequently that he is entitled to an abatement of the rent.

Now it is to be observed that the words "inevitable accident" are coupled with the word "other," which seems to shew to some extent that they are to be construed by the rule of *ejusdem generis*, that is, the inevitable accident pointed at is one of a kind similar to "flood, fire, storm, or tempest," referred to in the earlier words. In my opinion, the injury sustained by the building was not an inevitable accident within the meaning of those words. I think that the words do not apply to anything arising from the acts or defaults of either of the contracting parties. Those acts and defaults were made the subject of express covenant. I think the words do not apply to things existing at the time of the contract, or to the natural result of things existing, which were known or might have been known to the contracting parties, and further than that, it is obvious from the very words that they do not apply to a thing which is evitable or avoidable. It is to be an "inevitable accident," but here the accident, according to the Defendant's own case, might have been avoided if the building had been properly constructed, and consequently it was not an "inevitable accident." It is said that "inevitable accident" includes that which was not evitable by the acts of the Defendant. I do not think that is the real meaning. The clause is, I think, intended to apply to matters outside the existing state of things, and outside the acts and defaults of the contracting parties. That being so, I determine that the Defendant is not entitled to any abatement of rent in respect of the occupation of the warehouse by the Plaintiff for the execution of the repairs.

The second question is this: it is said that, over and above that loss, the Defendant has been put to other loss in consequence of the occupation of his warehouse for the repairs done by the Plaintiff, and that he is entitled to be paid for it. It is to be borne in mind that there is an express covenant that the lessor shall keep in good repair and condition the main walls and the main timbers.

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I have construed that covenant to mean that he shall put them into good condition if necessary, and in my judgment that covenant carries with it an implied license to the lessor to enter upon the premises of the lessee, and to occupy them for a reasonable time to do that which he has covenanted to do, and which he has not only covenanted to do, but which he has a right to do, because he has an interest in being allowed to perform his covenant. It is said that the time occupied was unreasonable, but of that I have no evidence. It is further said that the construction of the covenant, as carrying with it an implied license to enter, is inconsistent with the lessor's covenant for quiet enjoyment. I do not think it is, and for this reason, that the covenant for quiet enjoyment, if read as absolutely unqualified, is as inconsistent with an entry on the warehouse for a single moment as it is with an occupation for a month or a year. The mere sending a man in to do the repairs would be a technical breach of the covenant, if it was construed as absolute and unconditional. But that, in my opinion, is a thing which the Plaintiff has a clear right to do, for otherwise he could not perform that which he has covenanted to do. Therefore I think the covenant for quiet enjoyment must be read as subject to the license which I have held to be implied in the covenant to repair. The result is that the Defendant fails in his counter-claim, and I dismiss it with costs.

Solicitors for Plaintiff: *Gregory, Rowcliffes, & Rawle*, agents for *E. S. Wilson, Hull.*

Solicitor for Defendant: *A. R. Oldman*, agent for *Lowe, Moss, & Moss, Hull.*

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SAUNDERS *v.* DUNMAN.

FRY, J.
1878
Jan. 23, 24.

[1875 S. 6A.]

Mortgagor—Costs of Administration—Charge—Salvage Payment.

A mortgagor who has taken out letters of administration which were necessary to perfect the title to the mortgaged property, is not therefore entitled to be paid out of the mortgaged property the expenses of so doing.

Shearman v. *British Empire Assurance Company* (1) explained.

Statement.

THIS action was brought by the assignee of a mortgage against the trustees of the will under which the mortgaged fund was derived, against the personal representative of the mortgagor and his wife, and against the trustees of a creditors' deed made by the mortgagor; and the claim was for foreclosure and payment of the mortgaged fund. The only important question argued was whether the representative of the mortgagor, who had taken out certain letters of administration, was entitled to be paid out of the mortgaged property the expenses so incurred, the letters of administration being necessary in order to perfect the title of the mortgagee. The facts are fully stated by Mr. Justice *Fry* in his judgment.

Argument.

Kekewich, Q.C., and *G. Woods*, for the Plaintiff.

Cookson, Q.C., and *Langworthy*, for the Defendant *Thirza Dunman*, the representative of the mortgagor and of his wife, asked to be paid the costs of the administrations. This money must be treated as paid at the request of the mortgagee, who could not have obtained the fund unless letters of administration had been taken out. At all events, the probate duty must have been paid, and is a charge on the fund: *Bliss* v. *Putnam* (2); *Barraud* v. *Archer* (3). The mortgagee cannot take the benefit without the burden. These payments are in the nature of salvage, and form a first charge upon the fund: *Shearman* v. *British Empire Assurance Company* (1); *West* v. *Reid* (4).

(1) Law Rep. 14 Eq. 4.
(2) 7 Beav. 40.
(3) 2 Sim. 433.
(4) 2 Hare, 249.

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FRY, J.

1878

SAUNDERS v. DUNMAN.

[FRY, J., referred to *Clack* v. *Holland* (1).]

This is perhaps not a charge, but it is clearly incident to the property, and cannot be avoided.

Fischer, Q.C., and *N. Lawrence*, for the trustees of the creditors' deed.

Judgment.

FRY, J.:—

In this case I have two questions to determine. In the year 1843 *John Talbott* made his will, by which he gave one-fifth of his residue to his daughter, *Mary Budden*, for life, with remainder to *Elizabeth Talbott Saunders* and *Sarah Talbott Saunders*. The testator died in 1844. *Elizabeth Talbott Saunders* died an infant and unmarried, and under the terms of the will her share of the residue went over to her sister, *Sarah Talbott Saunders*. *Sarah Talbott Saunders* subsequently married *John Dunman*, and on the 30th of June, 1865, whilst *Mary Budden* was living, Mr. and Mrs. *Dunman* executed a mortgage to a certain *Edward Saunders* of various properties, including the one-fifth share of Mrs. *Dunman* under the will of *John Talbott*. The deed contains the usual covenants by *John Dunman*, and amongst them a covenant for further assurance. That deed was not acknowledged, and if it had been acknowledged, it does not appear to me that the validity would have been increased, as Mrs. *Dunman* was a married woman incapable of conveying absolutely her contingent reversionary interest in this fund.

On the 1st of December, 1865, Mr. *Dunman* executed a creditors' deed. The effect of that deed was to vest all his property in the Defendants *W. H. Dunman* and *W. K. Wait*, but it is clear that under that deed and the general law then in force he had the ultimate interest in his estate in the event of there being any surplus after paying the creditors.

In 1868 Mrs. *Dunman* died, and in the following year *Mary Budden* died, and thereupon the fund fell into possession in the sense that the husband was entitled, on taking out administration to his wife, to become the owner of that fund. Accordingly, in

(1) 19 Beav. 262.

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the year 1873, Mr. *Dunman* took out administration to his wife, and in so doing necessarily incurred certain expenses, and made certain payments. He died in March, 1876, and the Defendant *Thirza Dunman* subsequently took out letters of administration to *John Dunman*, and afterwards to Mrs. *Dunman*. She is now, therefore, the legal personal representative of *John Dunman* and of his wife.

This action is brought by *Joseph Saunders*, the assign of *Edward Saunders*, the mortgagee under the mortgage of 1865.

The first question which arises for determination is this: The Plaintiff has made Defendants to the action *Dunman* and *Wait*, the trustees of the creditors' deed, and the Plaintiff says that he is entitled to make them responsible for the costs of the action in the event of the mortgaged fund not being adequate to pay his principal, interest, and costs.

[His Lordship then referred to the facts, coming to the conclusion that there had never been a demand by the Plaintiff which had been resisted by the trustees of the deed, and that he could therefore not make them personally responsible for the costs.]

The next question is entirely different. As I have already mentioned, *John Dunman*, in 1873, took out letters of administration to his deceased wife; and *Thirza Dunman*, or those whom she now represents, have for a considerable period of time set up and insisted that the expenses which were incurred by *John Dunman* in taking out these letters of administration must be paid by the mortgagee of the fund. They ask not only that the actual probate duty may be allowed them, but that the costs incident to these letters of administration, and the costs of *Thirza Dunman* in taking out administration to Mrs. *Dunman* should also be paid out of the fund. Those three claims *Thirza Dunman* has advanced; and she was made a Defendant in consequence of her advancing those claims, and they have been advanced at the bar.

I confess that I have had some difficulty in comprehending what the precise ground of the claim was, but I think I shall not mistake if I say that the claim has been put on three grounds. In the first place it has been said that by the contract itself all that the mortgagee could get is the fund after payment of these administration expenses. The inquiry then is, what did *John*

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Dunman assign by the deed of 1865. He and his wife assigned "All that the said one-fifth part or share of the remainder of the said residuary estate so given and bequeathed to the said *Sarah Talbott Dunman* by the said recited will of the said *John Talbott*, deceased, as aforesaid (subject nevertheless to the life interest therein of the said *Mary Budden*), and all interest which may hereafter become due for the same, and all benefits and advantages to arise therefrom, and all right, title, interest, property, claim, and demand whatsoever both at law and in equity of them the said *John Dunman* and *Sarah Talbott* his wife, or either of them, into, out of, or upon the said legacy, or any part thereof." It is said that this is an assignment only of *John Dunman's* interest in the fund, and that his interest in the fund is the fund after payment of the probate duty. But it has not been shewn to me that the probate duty is a charge upon the fund, and in terms it is clear that what he assigns is the entire fund and all his interest in it, not all his interest in the fund.

In the next place it is said, and said truly, that taking out letters of administration was a *sine quâ non* of *John Dunman's* getting the fund; that his assigns could not get the fund except through him; and that what is a *sine quâ non* to the title is equivalent to a charge upon the fund on which that title exists. And accordingly I am referred to cases which have proceeded on the ground that legacy duty and succession duty, at all events, are charges upon the fund. Now it is not attempted to be shewn to me that by any statute this probate duty is made a charge upon the fund. Mr. *Cookson* says his argument is equally good whether it is or is not a charge, and he puts it upon the equality of a condition *sine quâ non* and of a charge. I am of opinion that the two things are essentially different. A charge constitutes an actual deduction from a fund; but something without which the fund cannot be got is not a necessary charge upon the fund, it is optional with the person who is entitled to the fund whether he performs that condition or not, whereas the charge is not optional. And the difference is very material for this purpose, because the present Plaintiff, not being subjected to a charge, had in his election whether to get the fund or not. He did not perform the condition which was requisite to get the fund; but somebody else, namely, *John Dun-*

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man, did perform it, he being, by virtue of the mortgage, the creditors' deed, and the bankruptcy law, entitled to any possible residue of the fund after satisfying the prior charges of the mortgagee and of the creditors. It may or may not be probable that anything would result to him out of the fund, but he had an ultimate contingent interest, and being so interested he thought fit to satisfy the condition, without which he could not get anything. The two things are in my opinion essentially different.

Then it is said that I must import from the circumstances a request from the mortgagee to the mortgagor to perform the condition, and that I must treat the money paid by the mortgagor as money paid to the use and for the benefit of the mortgagee at his request. It is not suggested that in fact there was such a request; but it is said that from the circumstances I must imply a request. The circumstances, to which I have already referred, shew that I could not imply it, for the person who made the payment derived a possible benefit from making these payments, and I cannot measure the extent of that benefit. There is, therefore, ample ground upon which he, not being a stranger to the fund, might make a payment for his own possible benefit, which payment enured undoubtedly to the benefit of those persons who had prior charges on the fund. A mortgagor having an equity of redemption, or an ultimate interest in the fund, and improving that fund by the performance of some condition without which he cannot get it, does not, in my opinion, by performing that condition create a charge in his own favour as against his mortgagee.

I was referred to two cases which undoubtedly appear at first sight somewhat to support the contention. The cases are *West* v. *Reid* (1) and *Shearman* v. *British Empire Assurance Company* (2). It is enough for me to say that in neither of these two cases does it appear to me that the point for which they were cited to me was the subject-matter of discussion and decision. In *West* v. *Reid* the point in controversy was abandoned at the Bar. In *Shearman* v. *British Empire Assurance Company* an offer had been made, which was not withdrawn from, and upon which the Master of the Rolls acted. It is quite true that he makes an observation there that it was salvage, but looking at his previous decision in *Clack* v.

(1) 2 Hare, 249. (2) Law Rep. 14 Eq. 4.

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FRY, J.
1878
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Holland (1) I very much doubt whether his Lordship meant to determine that question. Certainly that point does not appear to have been argued, the question for argument being whether a person who had made a salvage payment was entitled to the entirety of the fund; and an offer having been made to give the Defendant the portion of the fund which represented the actual payment, and that offer apparently never having been withdrawn, the case was decided on that ground. Those are authorities, therefore, which do not appear to me to sustain the proposition for which they were cited.

I come, therefore, to the conclusion that the claim set up by *Thirza Dunman* was ill-founded; that she having been brought here to litigate that claim, and being unsuccessful, I must direct her to pay so much of the costs of the Plaintiff in the action, as they have been increased by that claim.

Solicitors for Plaintiff: *Dangerfield & Blythe*, agents for *Symonds & Son, Dorchester.*

Solicitors for Defendants: *Whites, Renard, & Co.*, agents for *Henry Brittan & Co., Bristol; Lewis, Munns, & Longden*, agents for *Marshfield & Hutchings, Wareham.*

FRY, J.
1878
Jan. 28.

ROBERTS *v.* EVANS.

[1877 R. 62.]

Parties—Misjoinder—Husband and Wife—Action for Separate Estate—Costs—Rules of Court, 1875, *Order* XVI., *rr.* 1, 2, 13.

Since the Judicature Acts, as before, a married woman suing to recover separate estate ought to sue by a next friend, making her husband a Defendant.

In an action of this kind the husband was made a co-Plaintiff. The Defendant by his statement of defence objected that the husband ought to have been a Defendant. The statement of claim was afterwards amended for another purpose, but no alteration was made as to the parties.

At the trial the Court ordered the husband to be made a Defendant, and, in giving judgment for the wife, deprived her of the costs of the pleadings subsequent to the time when the Defendant took the objection.

Statement.

THIS action was commenced in the *Swansea* District Registry on the 19th of February, 1877, by *Catherine D. Roberts* (the wife

(1) 19 Beav. 262.

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of *J. H. Roberts*), by a next friend, and *J. H. Roberts*, as co-Plaintiffs, against *J. J. Evans*.

Evan Evans, the father of Mrs. *Roberts*, by his will, dated the 7th of January, 1864, gave and bequeathed certain freehold and leasehold hereditaments to his son, the Defendant, subject to his paying off a mortgage debt of £1000 secured upon (*inter alia*) a leasehold house belonging to the testator, being No. 66, *Oxford Street, Swansea*, and the testator bequeathed that house, and also another leasehold house in *Lewis Street, Swansea*, to the Plaintiff Mrs. *Roberts*, absolutely and for her sole and separate use, free from the control and engagements of her husband. And the testator appointed the Defendant and *William Richards* executors of his will. The testator died on the 4th of March, 1864, and his will was proved by the Defendant alone, *Richards* having renounced probate. The Defendant assented to the bequest of the two houses to Mrs. *Roberts*, and since that assent she had been in possession of the houses and in receipt of the rents.

The Plaintiffs claimed that the Defendant might be ordered to deliver up to Mrs. *Roberts* the title-deeds of the *Oxford Street* house.

By his statement of defence, delivered the 8th of May, 1877, the Defendant said that the title-deeds of the *Oxford Street* house were in the possession of a mortgagee of the house from the testator, and that Mrs. *Roberts* had never applied to him to produce those deeds. He also alleged that the action was not brought in the interest of Mrs. *Roberts*, but at the instance and by the direction of her husband, who had recently compounded with his creditors, and had no property of his own; and the Defendant submitted that means ought to be taken for the due protection of the interests of the Plaintiff Mrs. *Roberts* in the action, and that the husband ought to be made a Defendant, and that the wife ought to sue apart from her husband, and to be represented by a distinct solicitor. On the 23rd of June, 1877, the Plaintiffs delivered an amended statement of claim, by which they alleged that the Defendant had neglected and refused to pay off the mortgage debt of £1000, or to redeem the *Oxford Street* house. And they claimed a declaration that the Defendant was liable to pay the whole of the £1000 and interest, and to redeem the *Oxford Street* house

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FRY, J. 1878 ROBERTS v. EVANS. Statement.

and the other property on which the debt was secured, and that he might be ordered to do so and to obtain a reconveyance to Mrs. *Roberts*, or as she should direct, of the *Oxford Street* house. But the Plaintiffs did not make any alteration in the parties to the action. On the 5th of July, 1877, the Defendant delivered an amended statement of defence, repeating his objection as to parties. On the 30th of July, 1877, the Plaintiffs gave notice of motion for judgment according to their claim.

The motion now came on for hearing.

Argument.

North, Q.C., and *Badcock*, for the Plaintiffs:—

[FRY, J.:—Why is the husband made a co-Plaintiff?]

Smith v. *Etches* (1) shews that this is the proper form.

[FRY, J.:—This is an action for a legacy given to the wife's separate use.]

At any rate, under the Judicature Acts the objection is immaterial, the Court having full power at any time to make a change in the parties: Rules of Court, 1875, Order XVI., rr. 1, 2, 13.

Millar, for the Defendant:—

The action is not properly constituted; the wife is not properly protected. The action, as the pleadings now stand, is really the husband's. The practice of the Court of Chancery was, when a married woman sued in respect of her separate estate, that she should sue by her next friend, making her husband a Defendant. This practice is not altered by the *Judicature Act*.

North, in reply:—

[FRY, J:—Ought you not to pay the costs since the time your attention was called to the defect?]

No additional costs have been occasioned. The husband might have been a co-Plaintiff under the old practice, when he had no interest adverse to that of his wife: *Beardmore* v. *Gregory* (2).

[FRY, J.:—In that case there were two legacies, one of which was given to the wife for her separate use and the other was not. My impression is that the husband was always treated as having

(1) 1 H. & M. 558. (2) 2 H. & M. 491.

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an interest adverse to the wife, when she claimed property as being given to her separate use, as he might deny the separate use.]

The husband does not take the objection, and he would be estopped from afterwards denying that the property was his wife's separate estate. At any rate, a misjoinder of parties is immaterial under the present practice.

Judgment.

FRY, J:—

The only question in controversy is with regard to a part of the costs of the action. In my opinion the objection which the Defendant took by his statement of defence on the 8th of May, 1877, that the husband ought to have been made, not a co-Plaintiff, but a Defendant, was well founded. I think that, according to the well-settled practice of the Court of Chancery, which has been continued in the Chancery Division of the High Court, when a married woman institutes proceedings to recover property settled to her separate use in which her husband has no interest, she must sue by a next friend, making her husband a Defendant. It is true that the materiality of the objection is now much diminished by the provisions of Order XVI. But the objection is not removed by those provisions. In my opinion, when the objection was taken the record should have been amended. This was not done, and I think the wife was wrong in not doing it. I therefore direct that she shall have no costs of the pleadings after the 8th of May, 1877. I do not deprive her of the costs of the hearing. I give judgment for the wife in the terms of the notice of motion, and order the husband's name to be removed as a Plaintiff and to be added as a Defendant. The conveyance must be to the wife to her separate use.

Solicitors for Plaintiffs: *Crowder, Anstie, Vizard, & Co.*, agents for *Brown, Collins, & Woods, Swansea.*

Solicitors for Defendant: *Bell, Brodrick, & Gray*, agents for *Smith, Lewis, & Jones, Swansea.*

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FRY, J.
1878
Jan. 30.

LINOLEUM MANUFACTURING COMPANY *v.* NAIRN.

[1876 L. 273.]

Trade-mark—Patent—Name—New Substance.

Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent.

Statement.

THIS was an action to restrain the use of the word "*Linoleum*" as applied to floor-cloth.

A Mr. *Walton* obtained several patents, the last and principal being in 1863, for preparing floor-clcth by means of a certain solidified or oxidised oil, to which he gave the name "*Linoleum*," and the floor-cloth made by him therewith had been called and known as "*Linoleum Floor-Cloth*" and apparently also as "*Linoleum.*" The word "*Linoleum*" had not been previously used, and was a fancy name invented by Mr. *Walton*, and the substance itself appeared to have been new. In 1864 the *Linoleum Manufacturing Company*, the Plaintiffs in this action, was formed, and took assignments of Mr. *Walton's* patents and rights. The floor-cloth made by the company had been extensively used, and no one else had hitherto made or sold *Linoleum*, or *Linoleum Floor-Cloth*. The patent of 1863 had now expired, and the Defendants *R. Nairn* and *M. B. Nairn*, who were floor-cloth manufacturers, proposed to make and sell *Linoleum Floor-Cloth*, calling it by that name. This action was brought to restrain them. The details of the case are sufficiently stated in the judgment of his Lordship.

Argument.

Dickinson, Q.C., and *Millar*, for the company:—

The proprietor of a trade-mark has a right to protection, first, because it is his own property, and, secondly, because it has been used by him and is known to be his. The word "*Linoleum*" was invented by *Walton*, and has been for fifteen years used exclusively by him and his assigns: *Leather Cloth Company* v. *American Cloth Company* (1). It is an essential part of his trade-mark, and

(1) 4 D. J. & S. 137; 11 H. L. C. 523.

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indicates who is the maker of the goods. If the Plaintiffs called it "*Walton's Floor-Cloth*," that would not be a sufficient description, and the word "*Linoleum*" is essential. *Singer Manufacturing Company* v. *Wilson* (1) is in our favour. *Braham* v. *Bustard* (2) shews what is the effect of a name. No doubt the Defendants have added their name to their trade-mark, but that is not enough, and they have no right to use the word "*Linoleum*." It is true that hitherto the Plaintiffs have had a monopoly, but there is no reason why a patent and a trade-mark should not subsist together.

Argument.

Hastings, Q.C., and *Lawson*, for the Defendants.

FRY, J.:—

Judgment.

[His Lordship stated the facts as to the patents, and observed that down to the present time nobody else had made and sold either "*Linoleum*" or floor-cloth made of "*Linoleum*." But it appeared that the sole manufacture by Mr. *Walton* and those claiming under him was due entirely, or to a large extent, to the existence of the numerous patents, the effect of which was to give Mr. *Walton* and those who claimed under him a monopoly in the manufacture and sale of this *Linoleum Floor-Cloth*. It was therefore not surprising that the name by which Mr. *Walton* designated the compound had been applied exclusively to the manufacture of Mr. *Walton* and those who claimed under him. The case of the Plaintiffs was that they had a trade-mark, and that the essential, or one of the essential and material terms of that trade-mark was the word "*Linoleum*," and that this had been taken by the Defendants. His Lordship then described the trade-marks, and expressed his opinion that "*F. Walton's* Patent" was the most conspicuous part of the trade-mark used by the Plaintiffs, and that the word "*Linoleum*" appeared to be used only as descriptive, and was not an essential part of the trade-mark; and that the Defendants' trade-mark contained their own name much more conspicuously than the word "*Linoleum*," and was quite dissimilar from the Plaintiffs' trade-mark. His Lordship then continued:—]

But it has been argued that this case comes within the second

(1) 2 Ch. D. 434. (2) 1 H. & M. 447.

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FRY, J.
1878
LINOLEUM MANUFACTURING COMPANY v. NAIRN.
Judgment.

class of cases to which the Master of the Rolls referred in *Singer Manufacturing Company* v. *Wilson* (1), and that the word "*Linoleum*" from the user which had been made of it must mean the goods manufactured by the Plaintiffs, and that therefore to take the word "*Linoleum*" and use it, was to assert that the goods so sold and made were made by the Plaintiffs, and that any user of the word "*Linoleum*" was a fraud not in a moral point of view, but in the point of contemplation of this Court. The argument is that there was a misrepresentation, the misrepresentation consisting in alleging by the use of the word "*Linoleum*" that the goods were made by the Plaintiffs, when in fact they were made by the Defendants. It will be observed that the inquiry with regard to the use of the word "*Linoleum*" as a constituent element in the trade-mark, and the inquiry as to the use of the word "*Linoleum*" as a misrepresentation are one and the same inquiry, and I must consider what the word "*Linoleum*" meant as used at the time when the Defendants intended to attribute it to their manufacture.

In the first place, the Plaintiffs have alleged, and Mr. *Walton* has sworn, that having invented a new substance, namely, the solidified or oxidised oil, he gave to it the name of "*Linoleum*," and it does not appear that any other name has ever been given to this substance. It appears that the Defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if "*Linoleum*" means a substance which may be made by the Defendants, the Defendants may sell it by the name which that substance bears.

But then it is said that although the substance bears this name, the name has always meant the manufacture of the Plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the Plaintiffs were the only makers of this substance, would, in using the word, know he was speaking of a

(1) 2 Ch. D. 443.

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substance made by the Plaintiffs. But, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manufacture of the Plaintiffs, and has that meaning only so long as the Plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as shewing that the manufacture of one person is indicated by it and not the manufacture of another.

Those are the observations which have occurred to me upon a mere statement of the Plaintiffs' case, and how are they confirmed or shaken by the evidence in the case? [His Lordship then referred to the articles of association, the advertisements, and the patents taken out by the company, as shewing that they used the word "*Linoleum*" merely as descriptive of the substance, and looked on the words "*F. Walton's Patent*" as the essential part of their trade-mark. His Lordship then continued:—] I come, therefore, to the conclusion upon the facts as they are presented to me, and notwithstanding the evidence to which my attention has been drawn on the part of the Plaintiffs, that the word "*Linoleum*" did bear that meaning which Mr. *Walton* put upon it, namely, solidified or oxidised oil; that solidified or oxidised oil may be made by the Defendants if they are minded to make it; and if they are minded to call it by the only name which it bears, I think they are at liberty so to do. If I found they were attempting to use that name in connection with other parts of a trade-mark, so as to make it appear that the oxidised oil made by the Defendants was made by the Plaintiffs, of course the case would be entirely different.

Then what are the authorities to which my attention has been called upon this part of the case? That which is most near to the

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1878
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Judgment.

present case is *Braham* v. *Bustard* (1). In that case the Plaintiffs had invented a white soft soap, which the Court found to be a new article of commerce. Having so invented it they were minded to describe it in a manner which should distinguish their manufacture, and they gave to it an additional name, calling it "*Excelsior White Soft Soap.*" There the word "*Excelsior*," having no relation to the subject-matter, and being a purely fancy name, was held by the Vice-Chancellor to be intended to discriminate one particular species of soft soap, and accordingly the word "*Excelsior*" was protected. Now here, as I pointed out, the Plaintiffs having invented, or their predecessors in title having invented, a new subject-matter, use merely the name distinguishing that subject-matter, but do not use a name distinguishing that subject-matter as made by them from the same subject-matter as made by other persons. The two cases are essentially different. It appears to me, therefore, that there has been neither infringement of any essential part of the Plaintiffs' trade-mark nor any attempt on the part of the Defendants to represent the goods which they intended to sell as goods made by the Plaintiffs.

The Plaintiffs' case has therefore, in my judgment, failed, and dismiss the action with costs.

Solicitor for Plaintiffs: *S. Potter.*
Solicitors for Defendants: *Wild, Barber, & Browne.*

(1) 1 H. & M. 447.

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GRETTON *v.* MEES.

FRY, J.
1878
Feb. 4.

[1877 G. 106.]

Concluded Agreement—Agent—Acceptance—Repudiation—Payment into Court —Costs.

The Plaintiffs claimed £37 from the Defendant for the use and occupation of a house, and authorized him to pay the amount to a person whom they named. She called on the Defendant, and he then expressed his readiness to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender was made. The Plaintiffs sued the Defendant for the use and occupation, claiming £238. The Defendant paid £37 into Court:—

Held, that as soon as the Defendant expressed to the agent his readiness to pay the £37 there was a concluded agreement between him and the Plaintiffs for that amount, and that the Plaintiffs could not recover more:

Held, also, that the Defendant was entitled to the costs of the action from the time of the payment into Court.

Statement.

THIS was an action for damages for the use and occupation of a public-house called the *Greyhound*, at *Bethnal Green*, for three months, from the 24th of June to the 28th of September, 1876. The writ was issued on the 30th of April, 1877. *William Parker* and *Arthur Cates*, two of the Plaintiffs, were the legal owners of a leasehold interest in the property for a term which expired on the 29th of September, 1876. The Plaintiff Mrs. *Gretton* and two others of the Plaintiffs were the owners of the reversion, subject to the term vested in *Parker* and *Cates*, and they had agreed to assign to Mrs. *Gretton* and her co-reversioners their claim for dilapidations against their underlessee. The Defendant had been in possession of the property under an underlease, which expired on the 24th of June, 1876. The Plaintiffs claimed £238. By his statement of defence, delivered on the 14th of June, 1877, the Defendant alleged that there had been an express contract between *Parker* and *Cates* and himself that he should pay the sum of £37 2*s.* 3*d.* for the use and occupation for the period in question. On the 11th of June, 1877, the Defendant paid £37 2*s.* 3*d.* into Court in satisfaction of the Plaintiffs' demand.

This was the trial of the action.

It appeared that on the 18th of September, 1876, the solicitors

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of *Parker* and *Cates* gave notice to the Defendant that they were entitled to the rent for the three months in question, and required payment to be made by him. The Defendant placed the matter in the hands of his solicitors, and they, on the 21st of September, wrote to the solicitors of *Parker* and *Cates*, asking what amount of rent was claimed for the three months. On the 23rd of September the solicitors of *Parker* and *Cates* wrote to the Defendant's solicitors as follows:—

"The amount of rent claimed by our clients is £37 2*s.* 3*d.* Will you send us a cheque for the amount, or shall we have to apply to Mr. *Mees* direct?"

On the 25th of September they wrote again to the Defendant's solicitors as follows:—

"We have to-day given to Mrs. *Gretton* (the person entitled to the freehold of the above premises on the falling in of the original lease on the 29th inst.) a note to the tenant authorizing payment of the rent claimed by our clients to her. We shall, therefore, not have to communicate with you further upon the subject. Mrs. *Gretton* will to-day see the tenants of the houses where we have served the notices."

Mrs. *Gretton* called at the public-house on that day and saw the Defendant, and produced to him the note from the solicitors of *Parker* and *Cates*. He then told her that he was ready to pay the sum claimed. She, however, refused to receive it, and said that she should require more. No actual tender was made to her. The Plaintiffs afterwards refused to receive the £37 2*s.* 3*d.*, and ultimately the action was commenced.

Argument.

Cookson, Q.C., and *E. E. Witt*, for the Plaintiffs:—

Our title is not disputed; the only question is as to the amount of damages.

North, Q.C., and *Maclean*, for the Defendant:—

As soon as the Defendant expressed to Mrs. *Gretton* his willingness to pay the £37 demanded by the Plaintiffs there was a concluded agreement between him and them, and they cannot now demand more. Mrs. *Gretton* was their agent to receive the De-

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fendant's acceptance, but she had no authority to repudiate, and her repudiation cannot prevent the Defendant's readiness to pay from being an acceptance of the Plaintiffs' terms, and thus concluding a bargain.

Argument.

Cookson, in reply:—

When Mrs. *Gretton* repudiated the proposed terms there could be no acceptance. She did not go to the Defendant to receive the £37, but to demand more. He was dealing with her, not as a mere agent, but as a person who had an interest in the property. At any rate, there ought to have been a tender of the money to her.

Judgment.

FRY, J.:—

The question is, whether the express contract which is alleged by the defence has been proved. Was there or was there not a concluded agreement between *Parker* and *Cates*, who were the persons legally entitled to make the demand for the use and occupation during the three months, and the Defendant? In my opinion there was. They had made a demand upon the Defendant, and they authorized the payment to be made to Mrs. *Gretton*, whom they armed with authority to receive the money. At the interview with her on the 25th of September the Defendant expressed his readiness to pay the amount claimed. It was, in my opinion, immaterial that she intimated her determination not to accept that amount; that was entirely outside the authority which she possessed, which was only an authority to receive payment of the sum claimed. I therefore hold that the express contract which is alleged has been proved, and I give judgment for the Plaintiffs for the sum which has been paid into Court. But the Defendant must have the costs of the action from the time of the payment into Court.

Solicitors for Plaintiffs: *Burgoynes, Milnes, & Co.*
Solicitors for Defendant: *Martineau & Reid.*

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COLLETTE *v.* GOODE.

[1876 C. 417.]

Practice—Pleading—Defence—General Denial followed by Particular Denial—Amendment at Trial—Rules of Court, 1875, *Order* XIX., *rr.* 17, 18, 20, 22; *Order* XXVII., *rr.* 1, 6—*Copyright—Registration*—5 & 6 *Vict. c.* 45, *ss.* 13, 24.

In an action for damages for an alleged infringement of the Plaintiff's copyright in a song, the Defendant, by his statement of defence, alleged that the song had not been registered at *Stationers' Hall* until the 9th of December, 1876, and added, "the Defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register:"—

Held, that on this pleading the Defendant was only entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated.

Held, also, that leave to amend the statement of defence, so as to raise the latter point, ought not to be given, even though by the Plaintiff's own evidence at the trial it for the first time appeared that the name of the publisher had been untruly entered in the register.

Statement.

THIS action was brought to restrain an alleged infringement of the Plaintiff's copyright, and for damages.

The writ was issued on the 28th of December, 1876. By the statement of claim the Plaintiff alleged that he was the author and composer of a song entitled 'What an Afternoon!' being a book within the meaning of the Act 5 & 6 Vict. c. 45, that he was the sole proprietor of the copyright therein, and that the song had been duly registered at *Stationers' Hall*, in accordance with the provisions of the Act. The Defendant was a printer, and the Plaintiff alleged that without his consent, or the consent of any one having authority from him, the Defendant had printed and sold various copies of the song. And the Plaintiff claimed an account, damages, and an injunction.

The Plaintiff's song was published with the music.

By his statement of defence, delivered on the 21st of February, 1877, the Defendant said that he had for some years printed and published in an occasional sheet the words, without the music, of a number of about seventy songs, including new comic songs, the major portion of which were supplied to him by the publishers thereof for the purpose of being so printed and published by him,

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and that since the year 1866, he had had an agreement with Messrs. *Hopwood & Crew*, music publishers of *New Bond Street*, whereby, in consideration of his paying them £3 yearly, they gave him permission so to print and publish the words of all the songs published by them, and in May, 1876, they sent him three comic songs, one of which was the song entitled 'What an Afternoon!' for the purpose of his thus printing and publishing the words of it, and he accordingly printed and published the words without the music, together with the words of a number of other songs, in his song book, there being placed above each song the name and address of the publishers of the music.

Paragraph 6 of the statement of defence was as follows: "On the said song 'What an Afternoon!' which was sent to him in May, 1876, by *Hopwood & Crew*, there was printed a statement that it was 'Entered at *Stationers' Hall*,' which statement, as the Defendant has since ascertained, was untrue, and was a misrepresentation. The said song was not registered at *Stationers' Hall* in accordance with the Act of Parliament in that behalf, until the 9th of December, 1876; and the Defendant submits and insists that the false statement printed on the said song in the month of May, 1876, that it was then entered at *Stationers' Hall*, was such a misrepresentation by or on the part of the Plaintiff as to disentitle him to relief in this Honourable Court."

An amended statement of defence was delivered on the 28th of July, 1877, and there was added a paragraph 6a, as follows:

"The Defendant denies that the said song has been duly registered at *Stationers' Hall*. The time of the first publication thereof is not truly entered on the register."

The Plaintiff commenced similar actions against two other printers who had in the same way printed the words of the song under a license from *Hopwood & Crew*. *Hopwood & Crew* admitted their liability to indemnify the several Defendants against the Plaintiff's claims, and were, by orders made under rule 18 of Order XVI. of the Rules of Court, 1875, added as Defendants to the several actions. And an order was made on the 4th of April, 1877, directing that the question of the Plaintiff's right to recover against the Defendants should be tried in the action of *Collette* v.

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Goode, and that *Hopwood & Crew* should be at liberty to defend that action in the name of *Goode*, and that the proceedings in the other actions should be stayed.

This was the trial.

Statement.

It appeared that in the entry of the song made at *Stationers' Hall* on the 9th of December, 1876, the date of first publication was stated to be the 25th of March, 1876, and the publishers were stated to be *Hopwood & Crew*.

After the Plaintiff's case had been opened he was called as a witness, and by his evidence it appeared that in March, 1876, he made an arrangement with *Hopwood & Crew* to publish the song for him. He was to have it printed at his own expense, by his own printers, Messrs. *Stannard*, who were to supply copies to *Hopwood & Crew*, as they required them, and they were to pay the Plaintiff a royalty of 6*d*. for each copy sold. The first batch of copies printed was sent by Messrs. *Stannard* to the Plaintiff himself on the 25th of March, 1876, and he himself, within a week from that date, sold from 150 to 200 copies to friends of his own. No copies were supplied to *Hopwood & Crew* until early in April, 1876. In October, 1876, the Plaintiff put an end to his arrangement with *Hopwood & Crew*, and transferred the publication of the song to a Mr. *Pillow*, at *Liverpool*, who was the publisher when the entry was made at *Stationers' Hall* on the 9th of December, 1876.

The sheets in which *Goode* published the words of the song were sold at 1*d*. per sheet; the song as published by *Hopwood & Crew* was sold at 2*s*. per copy. It appeared that on the song as published by *Hopwood & Crew* were printed the words "Entered at *Stationers' Hall*" long before the entry was actually made.

The Plaintiff admitted that he instructed *Hopwood & Crew* to push the sale of the song. Their case was, that the publication of the words in the penny sheets acted as an advertisement of the song with the music, and was one of the best ways of pushing its sale; and that this mode of proceeding was in accordance with the ordinary custom of the trade, and was authorized by the instructions given to them by the Plaintiff.

Argument.

Cookson, Q.C., and *Shortt*, for the Plaintiff.

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North, Q.C., *Begg*, and *De Courcy Atkins*, for the Defendants:— Argument.

We shall prove that the actual first publication was earlier than the 25th of March, 1876. But, as it now appears from the Plaintiff's own evidence that the name of the publisher was untruly entered, we are entitled to rely upon that also, as shewing that the song has not been duly registered, and therefore, by sect. 24 of the Act 5 & 6 Vict. c. 45, the Plaintiff is not entitled to sue. Whether the Act means that the name of the publisher at the time of first publication, or the name of the publisher at the time of making the entry, is to be entered, the entry made by the Plaintiff is untrue, for at neither of these times were *Hopwood & Crew* the publishers. We are entitled, as the pleading stands, to prove any matter which will justify our denial of due registration: Order XIX., rr. 17, 18, 20, 22. One particular matter is pointed out in order to assist the Plaintiff, but this will not prevent our proving other matters. The general denial of due registration standing alone would have entitled us to prove any matter which would have made the registration insufficient, and we ought not to be prejudiced by stating more than was absolutely necessary. *Byrd* v. *Nunn* (1) is distinguishable. At any rate, leave to amend ought to be given under the power conferred by Order XXVII., rules 1, 6. The real question in controversy between the parties is, whether the Defendant ought to pay damages to the Plaintiff, and anything bearing on that question is necessary to its determination. This point arises out of the Plaintiff's own evidence, and could not have been known to the Defendants before: *Budding* v. *Murdoch* (2); *King* v. *Corke* (3); *Roe* v. *Davies* (4).

FRY, J.:— Judgment.

The Plaintiff sues in respect of an alleged piracy of his copyright by the Defendant. It is said by the Defendant, and I will assume for the present that it is rightly said, that the entry made by the Plaintiff at *Stationers' Hall* was imperfect, in respect both of the name of the publisher and the date of first publication of the song. It appears by the Plaintiff's own evidence in the box that the first

(1) 5 Ch. D. 781; 7 Ch. D. 284.
(2) 1 Ch. D. 42.
(3) 1 Ch. D. 57.
(4) 2 Ch. D. 729.

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publisher of the song was himself. It appears that he employed *Hopwood & Crew* to be his publishers in *London*, and that they commenced publishing in April, 1876. In October, 1876, they ceased to perform this function, and it was thenceforth performed by Mr. *Pillow*, at *Liverpool*. The entry at *Stationers' Hall* was not made till the 9th of December, 1876, and in it the Plaintiff stated that *Hopwood & Crew* were the publishers, and that the 25th of March, 1876, was the date of first publication; whereas, according to the Plaintiff's own evidence, *Hopwood & Crew* were not on the 25th of March, nor on the 9th of December, 1876, the publishers in any sense of the word. It is said by Mr. *North* that the Plaintiff is in this dilemma. If the word "publisher" in the Act means the publisher at the date of entry, *Pillow* was the publisher at that time, and the entry is consequently untrue. If, on the other hand, it means the publisher at the date of the first publication, the entry is equally untrue, because at that time the Plaintiff himself was the publisher, and not *Hopwood & Crew*. The first question is whether this defence, that the name of the publisher is not truly stated, is open to the Defendant upon the pleadings as they stand. Paragraph 6 of the defence says, that the song was not registered at *Stationers' Hall* "until the 9th of December, 1876." Pausing there, this would seem to be an admission that it was duly registered on the 9th of December, 1876. But by amendment a paragraph 6a is added, which says, "The Defendant denies that the said song has been duly registered at *Stationers' Hall*. The time of the first publication thereof is not truly entered on the register." This new paragraph contains, 1, a general proposition denying that there has been a due registration; 2, a particular allegation that the date of first publication has been untruly stated. Turning then to sect. 13 of the Act, I find that it requires that some half-dozen matters (of which two are the date of first publication, and the name of the publisher) should be truly stated on the register in order to make a due registration; the untrue statement of any one of them will render the registration undue. The Defendant has alleged that one of these several matters is falsely stated, and if that be so, he is well justified in his denial of due registration. He might have been equally well justified by alleging a false statement of any

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other of the six matters which are required to be stated, but he has in fact alleged a false statement of only one of them. I hold that the point of substance pleaded is the untrue statement of the date of first publication, and from that the Defendant has stated a conclusion of law that the registration was undue. This will not let in evidence of any other misstatement which would render the registration undue. I am of opinion that the case is governed by *Byrd* v. *Nunn* (1), which I only refer to because my decision was affirmed by the Court of Appeal, and that, upon the pleadings as they stand, the question whether the name of the publisher was truly stated is not open to the Defendant. Then arises the question whether, in the exercise of the very wide discretion given to me by Order XXVII., rule 1, I ought to allow the pleading to be amended so as to enable the Defendant to raise this defence. The rule says that "the Court or Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence, or reply . . . . and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." I have, therefore, to inquire what is the real question in controversy here. Mr. *North* says, that the real question is whether the Defendant shall or shall not pay damages to the Plaintiff, and that anything which may tend to the determination of that question is part of the real question in controversy. I do not think that proposition is correct. I think that the real question in controversy is whether *Hopwood & Crew* have or have not acted in accordance with the bargain between them and the Plaintiff, and that I should be bound to allow any amendment necessary for the determination of that question. It is quite true that the point which the Defendant now desires to raise has come out for the first time in the Plaintiff's evidence. But I do not think I ought to allow an amendment for the mere purpose of enabling the Defendant to raise a purely technical objection to the Plaintiff's title to sue, an objection which the Defendant never intended to raise, but of which he now adroitly seeks to avail himself. I think that the Plaintiff had a right to rely upon that which is in effect an admission in the statement of defence, that, in every

(1) 5 Ch. D. 781; 7 Ch. D. 284.

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respect but that one which is mentioned, the registration was duly made. I, therefore, refuse to give leave to amend.

The action was ultimately compromised.

Solicitors for Plaintiff: *Collette & Collette.*
Solicitors for Defendant: *Pawle, Fearon, & Coldham.*

FRY, J. 1878 *Feb.* 7, 8, 9, 11, 12.

BRAHAM *v.* BEACHIM.

[1876 B. 581.]

Trade Name—Name of Place—Imitation—Fraud—Injunction—Evidence of Deception.

The Plaintiff was the owner of and worked all the collieries in the parish of *R.* in *Somersetshire*, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her waggons and bill-heads the words "*R.* Collieries." The Defendants, from 1868, carried on at *R.* the business of coal merchants as the "*R. Coal Co.*," having depôts at various railway stations in the south and west of *England*, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of *R.*, but in a district or basin in which coal was raised similar to that raised within the parish, coal raised in the district, but outside the parish, being known in the market as *R.* coal. In 1873 the Defendants began to sell coals at *G.* in *Surrey*, by means of a local agent, and in 1875 they bought the good-will of a retail coal dealer named *C.* at *G.*, who had become bankrupt. They then advertised themselves in the *Surrey* newspapers, and otherwise in the neighbourhood, as "*The R. Colliery Proprietors and Factors, Coal and Coke Merchants* (late *C. & Co*)," and offered to supply coal of every description direct from the collieries:—

Held, that the Defendants were not entitled to use the name "*The R. Colliery Proprietors*," unless and until they should acquire a colliery within the parish of *R.*, or to use any style implying that their coal came from the parish of *R.*, unless and until they should become authorized to sell coals raised from a colliery within that parish:

Held, also, that, the acts of the Defendants being calculated to induce purchasers to believe that the Defendants were selling the Plaintiff's coal, it was not necessary for the Plaintiff to prove any instance of actual deception, or any actual damage.

Statement.

THE Plaintiffs in this action were Messrs. *C. B. Braham* and *W. S. Braham*, and the Dowager Countess *Waldegrave* (the wife of the Defendant Lord *Carlingford*), suing by a next friend.

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The Defendants were *W. Beachim* and *T. Gullick*, and Lord *Carlingford*.

The Plaintiffs, Messrs. *Braham*, were the trustees of the marriage settlement executed in 1863, of the Countess, under which she had an absolute power of appointment by deed or will over (*inter alia*) all the seams of coal and all coal mines and collieries situate within the parish of *Radstock*, in *Somersetshire* (except the coal lying under the glebe land in that parish, which the Countess was entitled to work under an agreement with the rector of the parish, and except also the coal lying under about an acre of land in the parish which belonged to a company called the *Writhlington Coal Company*), and, subject to that power and to some mortgages, these seams of coal, coal mines, and collieries were vested in the Plaintiffs, the Messrs. *Braham*, for an estate during the life of the Countess, in trust for her separate use. At the time when the action was commenced, the Plaintiffs' seams of coal were being worked by them by means of five pits or collieries, known as *Old Pit*, *Middle Pit*, *Ludlow's Pit*, *Wells Way Pit*, and *Tynings Pit*. There were no other pits within the parish of *Radstock*. The seams of coal, however, which were found in the parish extended beyond its limits, the whole district or basin (including the parish) in which these seams were found being known as the *Radstock District* or *Basin*. The seams were worked outside the parish by means of nine other pits or collieries, some of the coal raised throughout the district being known in some of the markets in the West of *England* as *Radstock* coal.

Prior to 1848 some of the Plaintiffs' collieries were worked by lessees, who carried on business under the name of the *Radstock Coal Company*, and were commonly called the *Old Radstock Company*. The other pits of the Plaintiffs were worked by other lessees. In 1848, on the expiration of the leases, the Countess took the working of her collieries into her own hands, and she afterwards continued to work them herself down to the time when the action was commenced. For some years prior to and down to 1873, the Countess in carrying on the business described herself on her bill-heads, and on the waggons which she used, as the owner of the five pits, naming them, adding her own name, and the title "*The Radstock Coal Works.*"

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The Defendants *Beachim* and *Gullick*, in the year 1868, commenced trading in partnership at *Radstock* as "*The Radstock Waggon Company.*" They afterwards added the business of coal merchants, and they then assumed the name of "*The Radstock Coal and Waggon Company*," describing themselves particularly in the coal business as "*The Radstock Coal Company.*" In the year 1873 the Countess complained that letters addressed to the *Radstock Coal Company*, and which were really intended for her, were delivered by the Post Office to the Defendants. The Defendants, on the other hand, asserted that the letters so addressed were intended for them. The matter was referred to the Post Office authorities, who decided that letters addressed to "*The Radstock Coal Company*" must be delivered to the Defendants. After this the Countess adopted a new style in her business, using on her bill-heads the words "The Right Honourable the Countess *Waldegrave's Radstock Collieries*," and putting a similar description upon her waggons.

In the year 1873 the Defendants *Beachim* and *Gullick* commenced selling coals wholesale at *Guildford*, in *Surrey*, by means of an agent there named *Franks*. In September, 1875, they purchased the goodwill of the business of a retail coal dealer at *Guildford* named *Cookson*, who had become bankrupt, and they then commenced carrying on a retail business as coal dealers there, *Franks* being their manager. They commenced using, upon the blind in their office window and in advertisements which they caused to be inserted in the local newspapers and railway time-tables, the style of "*The Radstock Colliery Proprietors.*" The following is a specimen of the newspaper advertisements:—

"THE RADSTOCK COLLIERY PROPRIETORS AND FACTORS,
COAL AND COKE MERCHANTS.
Offices for this District:
48, HIGH STREET, GUILDFORD,
(Late *W. Cookson & Co.*)
Supply direct from the Collieries
WALLSEND, SILKSTONE, HOUSE, WELSH, STEAM, AND KITCHEN COALS,
Of every description, at lowest prices, especially for cash.
Special contracts made for quantities at any station on the

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South Western Railway, the *South Eastern*, the *London, Brighton, and South Coast Railway*, the *Great Western*, or the *London, Chatham, and Dover Railways.*

Chief Offices:
RADSTOCK, SOMERSET."

This advertisement appeared in the *West Surrey Times* and other papers from December, 1875, to December, 1876.

On the office blind the Defendants put up, in June, 1876, the words, "*The Radstock Colliery Proprietors, Coal and Coke Office;*" but in October, on complaints being made by the Plaintiffs, they altered this to "*The Radstock Coal Company, Colliery Proprietors, Coal and Coke Office.*"

The Plaintiffs made further remonstrances, and ultimately the action was commenced.

The Defendants became, in 1876, the lessees of a colliery, called the *Old Welton Pit*, situate in the *Radstock* district, but outside the parish of *Radstock*, which they then worked. They had, however, in 1875, described themselves on a board put up at their depôt at the *Guildford Railway Station* as "*The Radstock Coal Company, Colliery Proprietors, Coal and Coke Factors.*"

The Plaintiffs alleged that the use by the Defendants of the name "*The Radstock Colliery Proprietors*" was a colourable imitation of the name "*The Radstock Collieries*" used by the Plaintiffs, and that it was calculated and intended to mislead persons intending to buy coal from the Plaintiffs into buying coal from the Defendants under the belief that they sold the Plaintiffs' coal. And the Plaintiffs claimed an injunction to restrain the Defendants from using the name of "*The Radstock Colliery Proprietors.*"

By their statement of defence the Defendants *Beachim & Gullick* relied upon the fact that coals raised in the *Radstock* district, though not in the parish of *Radstock*, were known as *Radstock* coals, and said that they had never used the name of "*The Radstock Colliery Proprietors*" except in connection with their *Guildford* business, and then only with the addition of the words "late *W. Cookson & Co.*" They denied that they had infringed any right of the Plaintiffs, or that any persons wishing to deal with the Plaintiffs had been misled. They said that they

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did not threaten or intend to use the name of "*The Radstock Colliery Proprietors*," but that they did intend to use names implying that they were the proprietors of collieries or coal mines at *Radstock*, and insisted that they were entitled to do so. But they said that they did not intend, and never had intended, to use any name which would import that they were selling, or authorized to sell, coals raised from the Plaintiffs' collieries at *Radstock*. And they said that, inasmuch as the coal sold by them was the same as that sold by the Plaintiffs, there would be no deception of purchasers, even if they used the same name as the Plaintiffs.

This was the trial of the action. The Plaintiffs did not prove any instances of actual deception of persons who had intended to purchase coals from them.

Argument.

Fischer, Q.C., *C. Browne*, *G. Francis*, and *B. Fossett Lock*, for the Plaintiffs, referred to *Singer Manufacturing Company* v. *Wilson* (1); *Seixo* v. *Provezende* (2); *Edlesten* v. *Edlesten* (3); *Wotherspoon* v. *Currie* (4).

Bagshawe, Q.C., and *E. Cutler*, for the Defendants *Beachim* and *Gullick*:—

No harm can be done to the Plaintiffs at *Guildford*; the action is really a *quia timet* one, because they think we may extend the use of the words "*The Radstock Colliery Proprietors*" to other places. But there is nothing to shew any intention on our part to do so. We have, however, a right to use that description. We are lessees, *i.e.*, proprietors of a colliery in the *Radstock* district, and we sell coal which is known as *Radstock* coal. There is no representation that our coal is that of the Countess.

[FRY, J., referred to *Dent* v. *Turpin* (5).]

It is known that there is a class consisting of proprietors of collieries at *Radstock*; no one could suppose that the Defendants represented themselves to be the owners of all the collieries there. *Seixo* v. *Provezende* is really in our favour, and so are *Colonial Life Assurance Company* v. *Home and Colonial Assurance Company* (6),

(1) 2 Ch. D. 434.
(2) Law Rep. 1 Ch. 192.
(3) 1 D. J. & S. 185.
(4) Law Rep. 5 H. L. 508.
(5) 2 J. & H. 139.
(6) 33 Beav. 548.

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Singer Manufacturing Company v. *Wilson* (1), and *Siegert* v. *Findlater* (2). In *Wotherspoon* v. *Currie* (3) there was express evidence of fraud. *Raggett* v. *Findlater* (4) shews that a word in its nature common cannot be regarded as part of a trade-mark or description. *Cope* v. *Evans* (5) is very like the present case, and is an authority in our favour on the question whether actual deception must be proved. *Dent* v. *Turpin* (6) was only a decision on demurrer as to parties.

Walter Ball, for Lord *Carlingford*.

FRY, J., after stating some of the facts, and referring to the change of name adopted by the Countess in 1873, continued:—

Now, it does appear to me that when the Countess had directed that change, with the evident design of getting out of the way of the name or style which the Defendants had adopted, there was cast upon them, as honest and honourable men, the obligation not to endeavour to follow her in the steps she had so taken to avoid confusion. They ought to have leaned rather in the direction of difference than in the direction of similarity.

[His Lordship then stated some others of the facts, and, referring to the board at the *Guildford Station* used by the Defendants in October, 1875, said:—]

It does not appear to me that the Defendants were then entitled to describe themselves as colliery proprietors, because I think that expression means the lessors, lessees, or workers of collieries. But they did use the words "Colliery Proprietors," and the question is whether this description of themselves was calculated and had a tendency to deceive? I do not say it would have been by itself deceptive; but I think, considering how the Countess had given up the words "Coal Works," really in order to take herself out of the description which the Defendants had thought fit to use, it was an indiscreet thing, to say the least of it, for them to follow on her heels.

(1) 2 Ch. D. 434.
(2) *Ante*, p. 801.
(3) Law Rep. 5 H. L. 508.
(4) Law Rep. 17 Eq. 29.
(5) Ibid. 18 Eq. 138.
(6) 2 J. & H. 139.

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[After referring to the Defendants' advertisement above stated, his Lordship said:—]

Now, that appears to me to be a representation that the *Radstock Colliery Proprietors*, having their chief office at *Radstock*, are the persons who had acquired the business of *Cookson & Co.*, having an office at No. 48, *High Street, Guildford.* I should have thought, on reading it, that those persons were proprietors of a colliery or collieries at *Radstock*, and, more than that, that they were entitled to describe, and did consider themselves, as the principal colliery proprietors at *Radstock.* It is, I think, clear that any person reading that advertisement might suppose that the supply came from those collieries, because the words are, "Supply direct from the collieries *Wallsend, Silkstone, House and Kitchen Coals,*" which last are exactly what the *Radstock* coals are. Further than that, it holds out that special contracts for quantities may be made at any of the railway stations mentioned for the supply of coal from the collieries, which I should think, at any rate, include the collieries at *Radstock.* Therefore, it appears to me that the Defendants, by that advertisement, held themselves out as desirous to carry on their business at any of the numerous stations on the lines of railway therein mentioned.

I cannot help, therefore, coming to the conclusion that they intended to hold themselves out as the *Radstock Colliery Proprietors*, who supplied coals from *Radstock.*

Having now stated the facts of the case, it becomes necessary to consider the nature of the defence, because it appears to me that the Countess, as the sole owner of the collieries in the parish of *Radstock*, is, therefore, presumably alone entitled to call herself "*The Radstock Collieries Proprietor*," and to restrain any person from infringing or interfering with her right. The case for the Defendants is this: It is said, and said truly, that there is in this district a series of beds of coal, which I have already referred to as the *Radstock* series, and that, wherever they are, there is the *Radstock* basin. That is true to a large extent. It is true that, at any rate until you reach a fault on the north, wherever the basin is worked there is found the *Radstock* coal. It is true that, although not at the pit's mouth and in the immediate neighbourhood, nor in the *Bath* markets, still in many markets in the south

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and west of *England*, the whole of that coal is known as *Radstock* coal. It is said that wherever there is *Radstock* coal there are *Radstock* collieries. But that does not entitle the workers of that coal to call themselves owners of collieries at *Radstock* or "*Radstock Colliery Proprietors.*" It does not follow that, wherever the *Radstock* coal is found, the workers of it are entitled to describe themselves as "*The Radstock Colliery Proprietors,*" or as the owners of collieries at *Radstock*.

In this case there are two things to be considered; first, the use of the expression "*The Radstock Colliery Proprietors.*" It appears to me that that expression must mean one of two things. It must either mean all the colliery proprietors who work in the *Radstock* basin, or it must mean the Plaintiff as being, *par excellence*, the person owning and working the *Radstock* collieries. I have had both those views put before me by the Defendants' witnesses. One of them said that, in the year 1871, when the proprietors of collieries in the district combined together—I believe in support of, or opposition to, a railway—they were spoken of as "*The Radstock Colliery Proprietors,*" and that was the only time he knew the expression to have been used. If that be so, it is far from clear to me that the Plaintiffs are not entitled to bring this action, because if the expression included the whole of those proprietors, it certainly included the Countess, who was by far the largest of them, for the evidence shews that more than half the coal sent from *Radstock* station is raised from her collieries. In this view the use of the words would certainly amount to a declaration by the Defendants that they were selling the coal of all those proprietors, and, therefore, selling the Plaintiffs' coal. It appears to me that by the title of "*The Radstock Colliery Proprietors*" the Defendants represented themselves to be the proprietors of the Countess's collieries, and there is no doubt that she has a right to restrain them from doing that. Nor does the wrong appear to me to be any the less from the fact that there are other collieries in the *Radstock* basin or district.

Mr. *Bagshawe* contended that the use by the Defendants of the generic name or title of *Radstock Collieries* could not entitle the Plaintiffs to maintain an action. But it must not be forgotten that the genus includes the species, and that, if you assume the genus, you assume all the species, and then, by adopting the name

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which they did, the Defendants represented themselves as selling the coals of the Plaintiffs and other persons, which come under the description of *Radstock* coal. That, I think, is wrong. The other view is, that if you speak of "*The Radstock Coal Proprietor*," or proprietors, everybody would consider it meant the Countess *Waldegrave;* and for this reason, that she alone has for many years worked the *Radstock* coal in *Radstock* parish, and she is undoubtedly the largest worker and shipper of coal in the district. If that be true, a wrong has undoubtedly been done by the Defendants.

I think, therefore, that they were wrong in describing themselves as "*The Radstock Colliery Proprietors.*"

The next matter to be inquired into is this: The Defendants expressly claim the right to describe themselves as the proprietors of collieries or coal mines at *Radstock*. Now, with regard to that, it appears to me there is a great distinction between *Radstock Colliery* (which may mean a colliery in the district) and a colliery at *Radstock*, because that, in my opinion, means a colliery within the parish of *Radstock*, and I do not believe that the parish has given its name to all the collieries in the *Radstock* series.

The Plaintiffs, therefore, in my opinion, are entitled to restrain the Defendants from trading under a description which represents that the coals they are selling are raised at *Radstock*, that is, from the works of the Countess.

It has been pressed by the Defendants' counsel that there is no evidence of damage in this case. In the first place, I am of opinion that it is not necessary to prove damage where the thing done by the Defendants has, in the opinion of the Court, a tendency to enable them to deceive by selling as the Plaintiffs' their own goods. I am of opinion that in this case there is a tendency to deceive, and that proof of special damage is not necessary, as was determined by Lord *Hatherley* in *Dent* v. *Turpin* (1). Then it is said that it is ridiculous to suppose that any harm can arise to the Countess at *Guildford*, where no one thought of buying her coal. But I must conclude that the Defendants adopted this title for some adequate motive, and what that motive could be, but to introduce their goods into the market at *Guildford*, I do not know. I have this in evidence, however, that so far back as the

(1) 2 J. & H. 139.

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year 1870, the predecessors of the Defendants, *Cookson & Co.*, applied to the Countess to be appointed agents for the sale of her coal at *Guildford*, and that offer was refused, on the ground of the break of gauge between the *Great Western* and *South Western Railways*. Since then, however, that difficulty has been removed, and it is now possible to send *Radstock* coal by railway direct to *Guildford*. Further than that, I cannot help observing that the Defendants' advertisement does not confine itself to *Guildford*, but professes to deal in coal at all those stations which are on the lines of railway mentioned.

I cannot, therefore, refuse the Plaintiffs relief, on the ground of want of proof of damage actually accrued.

In my judgment, the two expressions to which I have referred, namely, the description of the Defendants as "*The Radstock Colliery Proprietors*," and as the owners of collieries at *Radstock*, are both of them unjustified, because they are both calculated to deceive, by enabling the Defendants to sell, as and for coal raised by the Plaintiffs, coal raised by themselves.

I must, therefore, grant an injunction, in the terms which I will mention, and I give the Plaintiffs the costs of the action. The Plaintiffs will pay Lord *Carlingford's* costs, and add them to their own.

The injunction will be, To restrain the Defendants, unless and until they shall acquire a colliery or coal mine within the parish of *Radstock*, from trading under or using the name or style of "*The Radstock Colliery Proprietors*," or any other name or style signifying that the Defendants, or either of them, are proprietors of any colliery or collieries at *Radstock*; and to restrain the Defendants, unless and until they shall become authorized to sell or supply any coals raised or gotten from any colliery or coal mine within the parish of *Radstock*, from using any style or name signifying or implying that the Defendants are selling or supplying, or are authorized to sell or supply, any coal raised or gotten from any colliery or coal mine within the parish of *Radstock*.

Solicitor for Plaintiffs and for Lord *Carlingford*: *J. R. Macarthur*, agent for *Rees-Mogg, Son, & Davy, Cholwell, Temple Cloud.*

Solicitors for Defendants *Beachim & Gullick*: *Vallance & Vallance*, agents for *Murly & Sons, Bristol.*

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Feb. 15.

EDWARDS *v.* WEST.

[1876 E. 116.]

Fire Insurance—Option to purchase—Landlord and Tenant—Conversion.

Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase:—

Held, that, under the circumstances, the tenant had no claim to the insurance money.

The principle of *Lawes* v. *Bennett* (1) is not to be extended.

Reynard v. *Arnold* (2) distinguished.

Statement.

BY an indenture dated the 29th of September, 1870, made between the Defendant, *C. West*, of the one part, and the Plaintiffs, *W. Edwards* and *W. D. Edwards*, of the other part, the Defendant demised to the Plaintiffs a paper-mill at *Burghfield*, in *Berkshire*, with a dwelling-house, and appurtenances, and also six cottages and their gardens, and the machinery in the mill, for twenty-one years, at the yearly rents of £400 for the mill, £350 for the machinery, and £50 for the cottages, payable by quarterly payments. And the Defendant thereby, for himself, his heirs, executors, and administrators, covenanted with the Plaintiffs, their executors, administrators, and assigns, amongst other things, that the Defendant, his heirs and assigns, would, at his and their own expense, insure, or cause to be insured, the mill, dwelling-house, gasworks, cottages, and all other buildings thereby demised, and also the plant, machinery and fixtures, from loss or damage by fire, in some insurance office, in the sum of £14,000 at the least, and would for that purpose pay, or cause to be paid, the premium or premiums, or other sums of money which might be necessary for keeping every such insurance on foot; and that in case of any loss or damage by fire not exceeding £4000 happening to the said mill, cottages, buildings, machinery, and fixtures so insured, or any part thereof, all moneys which should be received from time to time

(1) 1 Cox, 167. (2) Law Rep. 10 Ch. 386.

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under or by virtue of any such insurance as aforesaid, should be forthwith laid out and applied in or towards the rebuilding, repairing, or reconstructing the said mill, buildings, cottages, machinery and fixtures, or such part thereof as should be destroyed or damaged by fire. But it was thereby provided that in case the damage by fire as aforesaid should exceed the sum of £4000, then and in such case the said term should cease and be at an end as and from the day of the happening of such fire; the Defendant, for himself, his heirs and assigns, covenanting with the Plaintiffs, their executors, administrators, and assigns, to immediately refund the proportion of the rent which might have been paid in advance beyond the day of such fire. And it was also agreed that in case the Plaintiffs, their executors, administrators, or assigns, should, before the 29th day of September, 1875, be desirous of purchasing the mill and premises, and the fee simple and inheritance thereof, together with the machinery and fixtures, at the price of £14,000, and of purchasing the cottages, lands, and hereditaments, and the fee simple and inheritance thereof, at the further price of £1200, and of such their desire should at any time on or before the 25th day of March, 1875, give to the Defendant, his heirs or assigns, notice in writing of such desire, then and in such case the Plaintiffs, their executors, administrators, or assigns, should be entitled to become the purchasers of the said hereditaments and premises, and the fee simple and inheritance thereof, and the machinery and things at those prices respectively; and the purchase was to be completed within six months after the notice was given. And it was further provided that in case the Plaintiffs, their executors, administrators, or assigns, should be desirous of purchasing the said mill and premises, with the machinery therein, at the sum of £14,000 as aforesaid, but not of purchasing the other hereditaments at the sum of £1200, they should be at liberty to do so.

In the month of September, 1875, negotiations began between the Plaintiffs and the Defendant as to enlarging the time for exercising the option to purchase; and in the month of April following a letter was written by the Defendant, which, as the Plaintiffs contended, enlarged the time to the 29th of September, 1876.

On the 6th of May, 1876, a fire occurred at the mill, and the

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Defendant received, under his insurances from the insurance offices, nearly £12,000 for the damage. On the 28th of September, 1876, the Plaintiffs gave the Defendant notice that under the terms of their lease they intended to purchase the mill and hereditaments for £14,000, and to claim the sums of money received from the insurance offices for the damage.

The Defendant refused to sell upon those terms, and the Plaintiffs brought this action, claiming to be entitled to purchase the mill, buildings, machinery and fixtures, and the cottages, for £14,000 and £1200; and that the Defendant might be declared a trustee for the Plaintiffs of the insurance money, which must be treated either as part of the purchase-money or as belonging to the Plaintiffs.

The action now came on for trial, and his Lordship, after argument, decided in favour of the Plaintiffs, that, on the construction of the lease, the option to purchase continued, though the term had been put an end to by the happening of the fire.

Argument.

Cookson, Q.C., and *E. S. Ford*, for the Plaintiffs, then contended that the option, when exercised, related back to the time of the agreement, since which the property had been partially converted into personalty by the fire and the receipt of the insurance money; and that the purchaser was entitled to it in that shape: *Lawes* v. *Bennett* (1); *Townley v. Bedwell* (2); *Weeding* v. *Weeding* (3); *Collingwood* v. *Rew* (4); *Drant* v. *Vause* (5). Those cases were between the heir and the executor, but the same principle must apply between vendor and purchaser. No injustice can be done here. The vendor contracted to sell the mill for a fixed sum, and ought not to be a gainer by the fire. The property has been converted, and the insurance money, like rent, goes with it. If not, the vendor had no insurable interest. Unless the lessee was to have the benefit of the insurance money, why did the lessor covenant to insure for £14,000? He was only bound to spend £4000 in case of a fire, and why did he bind himself to the exact sum of £14,000, except to compensate the purchaser? Moreover, in fact

(1) 1 Cox, 167.
(2) 14 Ves. 591.
(3) 1 J. & H. 424.
(4) 3 Jur. (N.S.) 785; 26 L. J. (Ch.) 649.
(5) 1 Y. & C. Ch. 580.

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it was the lessees who insured, as it would be out of the rent that the premiums were paid: *Reynard* v. *Arnold* (1). The lessor received the money merely as an indemnity, and it belongs to the purchasers.

Argument.

North, Q.C., and *Whitehorne*, for the Defendant, as to the right of the tenant over money paid for damage by fire, cited *Leeds* v. *Cheetham* (2); *Lofft* v. *Dennis* (3); *Poole* v. *Adams* (4). They were stopped by his Lordship.

Judgment.

FRY, J.:—

The Plaintiffs in this case allege that the option of purchase which was given by the lease of the 29th of September, 1870, to be exercised by a notice given on or before the 25th of March, 1875, and to be carried into completion on or before the 29th of September, 1875, was enlarged by subsequent correspondence, that by virtue of that correspondence a new contract was constituted under which the 29th of September, 1876, was substituted for the 25th of March, 1875, and that the option was exercised on the 28th of September.

I will assume, for the purpose of the present judgment, that the Plaintiffs are correct in that contention. There are, therefore, four dates material to consider; first, that of the contract creating the option; secondly, that of the injury to the premises; thirdly, that for the exercise of the option; and fourthly, that for the completion of the purchase according to that option.

Now the point which I am about to decide arises from the payment of a sum of between £11,000 and £12,000 by the insurance offices to the Defendant consequent upon the injury to the property by fire on the 6th of May, 1876. The Plaintiffs contend that that money so received by the Defendant was received by him as part-payment of the £14,000, which the Plaintiffs, under the option, were bound to pay; and that contention has been supported by three methods of argument.

In the first place, it has been said that by the law of *England*

(1) Law Rep. 10 Ch. 386.
(2) 1 Sim. 146.
(3) 1 E. & E. 474.
(4) 33 L. J. (Ch.) 639; 12 W. R. 683.

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the exercise of the option causes it to relate back to the time of the creation of the option in such a manner as to render the property for this purpose property of the purchaser as from the date of the contract which gave the option; so that here, although the option was given by a contract made in April, and not exercised till the 28th of September, yet that when it was so exercised on the 28th of September, it operated retrospectively, and made the property the property of the purchaser as from the month of April preceding, and consequently made the vendor trustee of the fruits of the property for the purchaser. Now it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligations which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconvenient. In the next place, the argument appears to me to be opposed to the general course of authority and principle. According to the view which I conceive to be true, the conversion of property, which means the treating it as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically enforced; so that where there is no specific performance of contract possible, there is no conversion. It flows in effect from the principle of equity which considers that done which ought to be done, and which the Court can compel to be done, and it extends so far back as those circumstances exist, and no farther. In other words, where there is a contract capable of being specifically enforced as from the date of that contract, and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser, and the money to be paid is deemed to belong to the vendor, because those two things ought to be done; but here there is no obligation to do them at any earlier date than that of the contract constituted by the exercise of the option. The conversion cannot, according to the principle, relate back to an earlier date than the contract which gives rise to it. I refer to the case of *Haynes* v. *Haynes* (1) as an authority for that general principle, and it appears to be important.

(1) 1 Dr. & Sm. 426.

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Upon that general principle, then, I should hold that the argument is untenable. But, then, I am told that the case is covered by authority, and for that purpose my attention is very properly drawn to the cases which begin with *Lawes* v. *Bennett* (1), and which shew that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the produce of the sale goes as part of his personal estate, and not as part of his real estate. Now, whether *Lawes* v. *Bennett* is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one Judge as somewhat difficult of explanation. I think that the language of Lord *Eldon* in *Townley* v. *Bedwell* (2), and of Vice-Chancellor *Kindersley* in *Collingwood* v. *Rew* (3), shews that they were not satisfied that that case was consistent with the general principles which were applicable to cases of conversion; and therefore, although I should implicitly follow *Lawes* v. *Bennett* in a case between the real and personal representatives of the person who granted the option, I do not think that I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor and the purchaser who claim under it. It is to be borne in mind that no authority can be produced which has extended the doctrine of *Lawes* v. *Bennett* in the slightest degree beyond what was decided in that case. The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I for one shall not extend it, because I think that it is limited by the general principle to which I have adverted. Therefore, upon that ground, I hold that there is no conversion of the estate from an earlier date than the 28th of September, when the notice was given. The fire having taken place, and the insurance money having been received at an earlier date, the intended purchaser has no right, upon the general principles of conversion, to assert a title to that money.

(1) 1 Cox, 167. (2) 14 Ves. 591.
(3) 3 Jur. (N.S.) 785.

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In the next place, it has been argued, upon the head of what I may call general equity, that it is reasonable, and right, and fair that the purchaser, the person who has the benefit of the option, should be entitled to use it so as to get the money, and that argument has been pressed upon me mainly by reference to the case of *Reynard* v. *Arnold* (1). When that case is looked at, I think it will be found to furnish no authority in the present case. The Plaintiff there was lessee with an option of purchase. The lease provided that he should pay rent down to the time of the completion of his purchase. By the lease the Plaintiff covenanted to insure in the sum of £800, and it was agreed that the moneys recovered under that insurance should be applied in reinstating the premises. Now, it is to be observed that both landlord and tenant in that case had an interest in the reinstatement, the landlord because it improved his property whether he did or did not become subject to the option, the lessee because he was bound to pay rent for the premises whilst the lease continued, and also because he had the option to purchase the premises for a definite sum. What happened was this: The lessee performed his duty, and insured for £800; the lessor, without the knowledge of the lessee, went to another insurance office and insured in another sum. In both these policies there were the usual average clauses. The effect of this was that the lessee could only recover part of the £800, and that the lessor would recover the other part. The lessor said, "I will keep the other part in my pocket." In other words, he said this: "I am at liberty to diminish the money which by contract between you and me you are to acquire for our common benefit, and I am at the same time at liberty to receive an exactly equivalent sum myself, and not to apply that to the purpose to which you and I contracted that the entire sum should be applied." He said, "I cut your money down by the doctrine of contribution, and yet I do not apply the sum which I receive under that doctrine as a contribution to the common fund for the restoration." The Lords Justices said that that was inequitable, and I do not think that it requires a very great stretch of reason to see that it was very inequitable. The money in the lessor's pocket was the measure of the injury which the lessor had done

(1) Law Rep. 10 Ch. 386; 23 W. R. 804.

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to the lessee by diminishing his right to receive under his policy. That case does not apply here.

The third ground upon which it has been argued is that of express contract. Of course, if I could find any express contract that the lessor should insure for the benefit of the lessee or the possible purchaser, I should give attention to that argument; but where is it to be found? What I find is that the lessor agreed to insure in the sum of £14,000. That is not the amount which the purchaser was to give for the property. He was to give £15,200 for the entire property, and the insurance covers the entire property. If the premises were damaged to an extent not exceeding £4000, then the term was to continue, and the lessor was to lay out the moneys which would be received under that insurance in or towards the restoration of the premises—to that extent there was a contract with regard to the application of the insurance money—but if the damage caused by the fire should exceed £4000, then the term was to cease. There is no stipulation whatever with regard to these insurance moneys except in one contingency, namely, fire causing damage of less than £4000. In that event the parties have said what was to be done with the money; as to every other event they have maintained absolute silence. It is said that I am therefore to infer that there was a contract that the money should be held for the benefit of the possible purchaser. I do not think that I can draw that inference from that silence, and I think that when we look at the nature of the option we see that there is no hardship whatever in not drawing such an inference. When a fire happens which causes damage amounting to more than £4000, the lessee is released from his obligation to pay rent, and then he has this question to ask himself, Is it worth my while to buy the premises, or is it not worth my while? If it is worth his while to buy them at the price fixed upon, he buys them; if it is not worth his while, he leaves them. That is the whole case.

I therefore assume that the Plaintiffs are right in the construction of the agreement, but I determine that they are wrong upon the contention with regard to the insurance moneys. As I understand, in that contingency they prefer to have the bill dismissed, and it must be dismissed with costs, subject to an observation as to one paragraph in the statement of claim.

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His Lordship ultimately ordered the costs occasioned by charges made in that paragraph to be borne by the Defendant.

Solicitors for Plaintiffs: *Rowley, Page, & Rowley.*
Solicitors for Defendant: *Pearce & Son.*

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Feb. 23, 25.

LEES *v.* PATTERSON.

[1876 L. 198.]

Pleading—Set-off—Counter-claim—Specific Statement of Facts relied on—Rules of Court, 1875, *Order* XIX., *rr.* 3, 4, 10—*Writ of Ne Exeat—Damages for improper Issue.*

A writ of *ne exeat* against a Defendant was obtained by the Plaintiff immediately after the commencement of an action. The Defendant was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence the Defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim:—

Held, that, as the Defendant had not moved to discharge the writ, it must be taken to have been properly issued, and, consequently, that the Defendant was not entitled to any damages.

The Defendant made the allegation that the writ had been improperly issued, and the claim for damages, in one paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-claim:—

Held, that the pleading was good as a counter-claim.

Crowe v. *Barnicot* (1) distinguished.

Statement.

THIS action was brought to obtain an account of certain partnership dealings between the Plaintiff and the Defendants.

The Plaintiff, *W. J. Lees*, resided in *England;* the Defendant *Patterson* was a farmer residing in *Canada;* the Defendant *G. Lees* (a brother of the Plaintiff) was also a farmer residing in *Canada.* The statement of claim alleged that in June, 1876, the Plaintiff was on a visit to his brother in *Canada*, and that it was then agreed between the Plaintiff and the Defendants that they should enter into an adventure by way of partnership together, in the purchase of horses in *Canada* and the sale of them in *England;*

(1) 6 Ch. D. 753.

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that each of the three should advance an equal sum of money to be employed in the adventure, and that the moneys to arise from the sale of the horses should, after payment of all expenses, be divided between the three in *England* immediately after the horses had been sold there, upon the terms of their sharing equally in the profit or loss which might arise from the adventure. The Plaintiff alleged that he, on the 11th of July 1876, paid to the Defendants £300 as his share of the capital to be employed in the adventure, and that the Defendant *G. Lees* shortly afterwards advanced an equal sum for the same purpose, but that *Patterson* only advanced about £200. The moneys thus advanced were expended in the purchase in *Canada*, and the transhipment to *England*, of twenty horses, which arrived in *England* in August, 1876, where they were sold. One of the horses was sold by the Plaintiff for £27 10*s*., and he retained that sum. He alleged that on or previously to the 9th of September, 1876, fifteen of the horses were sold by *Patterson* for £897, which sum he received, and the Plaintiff alleged that *Patterson* refused to account for the £897, and announced his intention of at once returning to *Canada* without accounting for it.

The writ in the action was issued on the 12th of September, 1876. The Plaintiff and both the Defendants were at this time in *England*. On the 12th of September, 1876, the Plaintiff obtained a writ of *ne exeat regno* against *Patterson*, marked with the sum of £280, upon an affidavit in which the Plaintiff deposed that, after giving credit for the £27 10*s*., *Patterson* was indebted to him in the sum of £280 and upwards, on account of his share of the moneys received by *Patterson* on the sale of the horses. The Plaintiff on obtaining the writ gave an undertaking as to damages. *Patterson* was arrested under the writ, but was discharged on payment to the sheriff of the £280. On the 19th of September, 1876, a similar writ was obtained by the Defendant *G. Lees* against *Patterson*, marked with the sum of £300. *Patterson* was arrested under this writ, but was discharged on payment of the £300 to the sheriff. Both the £280 and the £300 were afterwards paid into Court to the credit of the action.

By his statement of defence *Patterson* admitted an agreement for a partnership, but said that the terms of it had not been cor-

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rectly stated by the Plaintiff. He said that the real agreement was that he and the Defendant *George Lees* should be entitled to the profits in equal shares, the Defendant *George Lees* taking his share for the benefit of himself and the Plaintiff, to whom the Defendant *Patterson* was not to be in any way accountable. *Patterson* also said that he had advanced £400 for the purposes of the undertaking, and he alleged that the writs of *ne exeat* had been improperly obtained, and that he had sustained considerable injury and damage by their issue and by his arrest under them, and he submitted that the Plaintiff and *George Lees* respectively ought to be ordered to pay him damages in respect thereof; and he said (by paragraph 29), "The said *George Patterson* also states that the said two orders and writs of *ne exeat regno* were improperly obtained, and that he was thereby arrested and imprisoned on two occasions, and suffered considerable injury and damage, and he claims to set off the amount which shall be ordered to be paid to him by the Plaintiff and the Defendant *George Lees* respectively, either under the undertaking as to damages contained in the said orders respectively, or otherwise, against any amount which may in this action be found to be due to the Plaintiff and the Defendant *George Lees* or either of them."

This was the trial of the action.

Argument.

North, Q.C., and *A. T. Watson*, for the Plaintiff:—

The claim for damages and the set-off are not properly raised by way of counter-claim; there is no allegation of the facts relied upon distinct from the defence, and no prayer or claim as there should be in a counter-claim: Rules of Court, 1875, Order XIX., rr. 3, 4, 10; *Crowe* v. *Barnicot* (1).

[FRY, J.:—In *Crowe* v. *Barnicot* the Defendant only claimed damages "for the loss he has sustained in consequence of his expenditure aforesaid." Here the reference is to "the said two orders and writs of *ne exeat regno*," which have been previously mentioned. I think this is unobjectionable. It is not necessary that a counter-claim should have the words "by way of counter-claim" printed in big letters at the head of it. I think this case does not come within my ruling in *Crowe* v. *Barnicot*.]

(1) 6 Ch. D. 753.

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The writs of *ne exeat* have never been discharged, and the money is still in Court.

Cookson, Q.C., and *B. Eyre*, for *Patterson*:—

We do not resist judgment for the usual partnership accounts. The claim for damages may be properly dealt with now; it is independent of the result of the accounts. The writ of *ne exeat* was *functus officio* when the money was paid; it was not necessary to move to discharge it. The money was paid only as the price of the Defendant's release from custody. Even if the action had been tried, and judgment given for the Plaintiff, it would be open to the Defendant to move for an inquiry under the undertaking as to damages. The Plaintiff's writ was improperly obtained, because *Patterson* was only going away to his own home in *Canada*, and also because it depended upon the taking of the accounts whether anything was due from him to the Plaintiff. The arrangement was that nothing was to be paid to the Plaintiff till the conclusion of the adventure. A *ne exeat* ought only to be issued for a sum certain. And the *ne exeat* issued by the Defendant *G. Lees* was irregular, because he was only temporarily resident in *England*, his domicil being in *Canada*: *Smith* v. *Nethersole* (1).

[FRY, J.:—There the Plaintiff's visit to *England* was colourable; here it was due to the contract.]

Hyde v. *Whitfield* (2).

[FRY, J.:—There the affidavit was sworn out of the jurisdiction.]

The domicil of the partnership is *Canada*, where the contract was entered into.

[FRY, J.:—Is it not *England* which is the *locus solutionis*? All the three were to be in *England* at the time of the harvest.]

The mere fact that there is a debt does not justify the issuing of a *ne exeat*; it must be a debt due *in præsenti*, and due to a person resident in *England*.

The claim against the co-Defendant is properly raised in this action: Order XVI., r. 17; *Furness* v. *Booth* (3). *Shephard* v.

(1) 2 Russ. & My. 450. (2) 19 Ves. 342.
(3) 4 Ch. D. 586.

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Beane (1) is now overruled, as appears by *Harris* v. *Gamble* (2). When a man has been wrongfully arrested the Court will assume that he has sustained sufficient damage to justify an inquiry.

North, in reply:—

Patterson ought to have moved to discharge the writ, and he might have done so either before or after paying the money. As it is, he has submitted, and cannot now question the regularity of the writ. A *ne exeat* can be issued in a suit for an account, and it is enough for the Plaintiff to swear that he believes the balance in his favour will amount to so much: *Daniell's* Chancery Practice (3); *Rico* v. *Gualtier* (4); *Jackson* v. *Petrie* (5); *Whitehead* v. *Bennett* (6).

H. Brockholes Thomas, for the Defendant *G. Lees*, was not heard.

Judgment.

FRY, J.:—

I cannot accede to the Defendant *Patterson's* application. The writs of *ne exeat* were granted upon affidavits which satisfied the Court of the propriety of granting them, and *Patterson* has submitted to them instead of moving to discharge them. I must, therefore, take it now that the writs were properly issued. Even on the merits, I am disposed to think that they were properly issued. I think that under the contract the division of the profits ought to have taken place in *England*, and the Defendant was not entitled to postpone the distribution by leaving *England*. He had received nearly £900, and was about to go away with it. There will be judgment for the ordinary partnership accounts, with a declaration that the Defendant *Patterson* is not to be allowed any set-off by way of damages for the alleged improper issue of the writs of *ne exeat*.

Solicitors for Plaintiff and for Defendant *G. Lees*: *Milne, Riddle, & Mellor*, agents for *W. & F. W. Johnson, Stockport.*

Solicitors for Defendant *Patterson*: *Evans & Eagles.*

(1) 2 Ch. D. 223.
(2) 6 Ch. D. 748, 752.
(3) 5th Ed. p. 1551.
(4) 3 Atk. 501.
(5) 10 Ves. 164.
(6) 10 Jur. 3.

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SPIKE *v.* HARDING.

FRY, J.
1878
Feb. 25.

[1876 S. 143.]

Confusion of Boundaries—Landlord and Tenant—Duty of Tenant—Action to ascertain Boundaries—Jurisdiction—Practice—Reference to Chambers in Lieu of Commission.

The duty of the tenant of land, immediately adjoining other land of his own, is, not merely to leave the boundary between his own land and his landlord's distinct at the expiration of his term, but to keep it distinct during the term.

The Court has, therefore, jurisdiction during the term to ascertain the boundary if the tenant has confused it.

A reference to Chambers to ascertain boundaries directed in lieu of the issue of a commission, further consideration being adjourned and costs reserved.

Statement.

THIS action was brought for the purpose of ascertaining the boundaries between land belonging to the Defendants and land belonging to the Plaintiffs, but occupied by the Defendants under a lease granted by the Plaintiffs' predecessor in title.

In December, 1854, Mrs. *D'Arcy* was the owner in fee of a house and land near *Lymington*, called *Home Mead*, immediately adjoining to another house and land, called *Grove House*, of which the Rev. *W. H. Thompson* was the owner in fee.

By an indenture, dated the 9th of December, 1854, Mrs. *D'Arcy*, in consideration of the sum of £20, and of the yearly rent of 1*s*., and of the covenants in the indenture contained, demised to *Thompson*, his executors, administrators, and assigns, a piece of land adjoining the *Grove House* property containing thirty-seven perches, and forming part of the *Home Mead* property, for the term of 500 years from the 1st of June, 1855. The lease contained covenants by *Thompson* to pay the rent, to put up along the respective sides of the demised land which adjoined other parts of Mrs. *D'Arcy's* property a substantial park pale-fence, or a wall, and to keep the same in repair to the satisfaction of Mrs. *D'Arcy*, her heirs or assigns, and a further covenant that *Thompson*, his executors, administrators, or assigns, "shall not, nor will permit or suffer any trees, shrubs, or plants of any description, which may

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at any time during the said term be standing or growing upon the said piece or parcel of land hereby demised, to grow or extend themselves above the height of seven feet from the ground, without the consent of the said *K. L. E. D'Arcy*, her heirs or assigns, or in any manner so as to intercept any part of the view from the said messuage, grounds, and premises, and shall and will, upon the request of the said *K. L. E. D'Arcy*, her heirs or assigns, cut, lop, and trim such trees, shrubs, and plants, or any of them, so as to keep the same within the limit aforesaid; and in case of his or their default or neglect so to do for seven days after any such request shall be made in writing, ... then and so often as the same shall happen it shall be lawful for the said *K. L. E. D'Arcy*, her heirs or assigns (without prejudice to her or their remedy under the covenant hereinbefore contained), to enter upon the said demised premises, and to cut, lop, and trim all or any trees, shrubs, and plants thereon, so as to keep the same within the limit aforesaid." There was also a covenant by *Thompson* restricting his right of building upon the demised land.

At the time when this lease was executed there were, close to a part of the boundary line between the land belonging to *Thompson* and the demised land, a ditch and a bank, and on the top of the bank was a post and rail-fence. Shortly after the execution of the lease *Thompson* entered upon the demised land, and he removed the post and rail-fence, levelled the bank, and filled up the ditch.

The Plaintiffs were the successors in title of Mrs. *D'Arcy;* the Defendants were the successors in title of *Thompson*. The Plaintiffs alleged that the old ditch was on that side of the bank which adjoined *Thompson's* land, and that, consequently, the ditch and the bank were the property of Mrs. *D'Arcy;* and they alleged that *Thompson* had acted wrongfully and without the consent of his lessor in levelling the bank and filling up the ditch, and that he had thus entirely obliterated the boundary between the demised property and his own. And the Plaintiffs alleged that a difference of opinion existed between them and the Defendants as to the situation of the boundary. There was a further dispute about another portion of the boundary.

The Plaintiffs claimed that an inquiry might be directed, or

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that, if necessary, a commission might issue, for the purpose of ascertaining the boundaries between the premises belonging to the Defendants and the demised premises.

By their statement of defence, the Defendants alleged that the old ditch was on that side of the bank which adjoined the demised land, and that consequently the ditch and the bank were the property of *Thompson*.

There were some large elm-trees growing on the site of the old bank.

This was the trial of the action.

It appeared that the Plaintiffs had, in 1875, brought an action at law upon the covenant to lop the trees, in which action the jury found that the elm-trees were on the Defendants' land. A new trial was moved for, but was refused.

Statement.

North, Q.C., and *S. Dickinson*, for the Plaintiffs:—

Argument.

The boundary has been confused by the tenant's act, and the Court has jurisdiction to ascertain it: *Speer* v. *Crawter* (1); *Willis* v. *Parkinson* (2); *Wake* v. *Conyers* (3).

Hastings, Q.C., and *Whitehorne*, for the Defendants:—

The jurisdiction to ascertain the boundaries between the land of a tenant and that of his landlord arises only at the end of the term: *Attorney-General* v. *Fullerton* (4). In *Attorney-General* v. *Stephens* (5), it was assumed, not decided, that the jurisdiction would arise during the term. The Plaintiffs ought to shew that it is impossible to ascertain the boundaries without the aid of the Court.

[FRY, J.:—I do not understand what Sir *T. Plumer* means in *Miller* v. *Warmington* (6). If the Court can discover where the boundaries are, any one else can, so that if that is the test, I do not see how there could ever be a case for the interference of the Court.]

At any rate, no case is shewn for the interference of the Court.

(1) 2 Mer. 410.
(2) Ibid. 507.
(3) 2 Cox, 360.
(4) 2 V. & B. 263.
(5) 6 D. M. & G. 111.
(6) 1 Jac. & W. 491.

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The only substantial question is as to the ownership of the site of the old bank and ditch, so that it is really an ejectment action.

[FRY, J.:—The dispute is not limited to that.]

Substantially it is. If it is once determined on which side of the bank the ditch was, the law is clear as to the ownership: *Vowles* v. *Miller* (1). The question was really determined in the action on the covenant, and the present action ought to be dismissed with costs: *Metcalfe* v. *Beckwith* (2).

Judgment.

FRY, J.:—

In my opinion the Plaintiffs have shewn a case which requires me to give judgment for ascertaining the boundaries of the land. [His Lordship stated the effect of the lease, and continued:—]

Now, before going further, I pause to inquire what are the obligations which Mr. *Thompson* took on himself by that lease? I cannot state them better than in the words of Lord *Eldon* in *Attorney-General* v. *Fullerton* (3), where he says: "It has been long settled, and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own." That obligation, in my opinion, rests on the tenant, not merely at the end of the term when he comes to deliver up the property, but also during the subsistence of the term; and that for several intelligible reasons. In the first place, the landlord does not lose his interest in the property during the demise. In most cases he retains rights of an important kind in it. He has the right of distress for the recovery of the rent, and in this particular case the lessor has a right of entry on the land in the event of the covenant to lop the trees not being observed, and therefore it was of great importance to Mrs. *D'Arcy* that the demised premises should be kept distinct during the currency of the term.

Now, how did matters stand with regard to the boundary at the time of this demise? The common case of Plaintiffs and Defen-

(1) 3 Taunt. 137. (2) 2 P. Wms. 376.
(3) 2 V. & B. 264.

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dants is that the two properties were separated from each other by a ditch, but where that ditch ran is a matter of controversy between them. The Plaintiffs say that the bank was on Mrs. *D'Arcy's* side of the ditch; the Defendants say that the bank was on Mr. *Thompson's* side of the ditch. And there is a further dispute as to another part of the boundary. There is therefore, abundant controversy between the Plaintiffs and the Defendants with regard to the true position of the boundary line between them. I should add that it is not disputed that the ditch has been filled up and the bank levelled, and that that was done by Mr. *Thompson*, under whom the Defendants claim.

This, therefore, appears to me to be a case in which the tenant has confessedly broken the obligation or duty which rested on him to keep the boundary distinct during the term. And, stopping there, I think the Plaintiffs' case is clear.

How is the case met? In the first place, it is said that the boundaries can be ascertained. That does not appear to me to be material. If the Court was convinced that they could not be ascertained, probably it would not stultify itself by issuing a commission, but it is because there has been a departure from the tenant's duty, and there is a controversy about the boundaries, that application is made to the Court. On the evidence, I conclude that no actual physical boundary exists.

Then it is said that the bank and the ditch were on Mr. *Thompson's* land, and that all that has been done was done on his own land. That might well be said if he had not assumed the obligations of a tenant; and it must be observed that, in issuing the commission, I do not say that he was bound to keep up the bank or the ditch; I only say that he ought to have kept either that boundary, or some other boundary, which would render the two properties clearly distinct. I do not say he was bound to keep the then existing boundary, but a boundary.

Then it is said that the circumstances of the case import an intention on the part of both landlord and tenant to permit this confusion. It is said that, looking at the nature of the properties, I must infer that the intention was to permit the demised land to be occupied with the other land, for the purpose of adding to the agreeable occupation of the former. That may well be, but still a

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FRY, J. 1878 SPIKE v. HARDING. Judgment.

boundary might be kept up. And, so far from the lease importing an intention that the boundary shall not be kept up, it most distinctly imports an intention that it shall, because the lease reserves important rights to the lessor over the demised land, which do not extend to the lessee's own land. I cannot infer from the evidence any consent on the part of the lessor to what has been done.

It has been suggested that the whole matter has been determined in the action on the covenant to lop the trees, but that did not determine the whole controversy, as I have already pointed out. Moreover, as it appears to me, the action itself shews very strongly the necessity for establishing the boundaries, because the question about the trees may arise from time to time, and, until the boundary is definitively settled, it may have to be decided over and over again. So far from justifying the Defendants in their resistance to this action, the action on the covenant only shews the great importance to the Plaintiffs of ascertaining the ancient boundary. The result is that I must direct the issue of a commission in the usual form.

North:—We should prefer an inquiry to a commission. The jurisdiction in an action of this kind is analogous to that in a partition action. Before 1852 the practice in partition actions was to issue a commission, but the modern practice is to direct an inquiry in Chambers.

Hastings:—We agree that an inquiry will be the more convenient form.

FRY, J.:—

If you both prefer that form, I see no objection to it. I can on the further consideration, if necessary, direct the physical boundary to be laid down. I will direct an inquiry in Chambers to ascertain the boundaries, adjourning the further consideration and reserving the costs.

Solicitor for Plaintiffs: *J. E. Coxwell*, agent for *W. Coxwell, Lymington.*

Solicitors for Defendants: *Hume, Bird, & Bird*, agents for *Moore & Jackman, Lymington.*

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HARRIS *v.* GAMBLE.

FRY, J.

[1877 H. 97.]

1878

Jan. 28; Feb. 26.

Pleading—Defence—Admission—Rules of Court, 1875, *Order* XIX., *rr.* 17, 20; *Order* XXXVI., *r.* 18—*Notice of Trial—Action in Chancery Division—Order* XXXVI., *r.* 8—*Appendix B., Form No.* 14.

A Defendant, by his statement of defence, simply "put the Plaintiffs to proof of the several allegations in their statement of claim." He did not appear at the trial, but service of a notice of trial upon him was proved:—

Held, that the Defendant had admitted the facts alleged in the statement of claim, and that the Plaintiffs were entitled to judgment, without adducing any evidence in support of their case.

In an action in the Chancery Division marked with the name of Vice-Chancellor *Hall*, the Plaintiffs served notice of trial "by a Judge in *Middlesex*":—

Held, that this was a sufficient notice.

Statement.

THIS was an action by vendors for the specific performance of a contract for the purchase of land (already reported on points of pleading (1)). The Defendant *Gamble* delivered a statement of defence in the following words:—"The Defendant puts the Plaintiffs to proof of the several allegations in their statement of claim." At the trial *Gamble* did not appear.

Argument.

Cookson, Q.C., and *Dunning*, for the Plaintiffs, asked for judgment against *Gamble* on an affidavit of service of notice of trial, and submitted that, on the pleadings, the Plaintiff's case was admitted: Rules of Court, 1875, Order XIX., rr. 17, 20.

Judgment.

FRY, J:—

As against *Gamble* I am of opinion that the allegations of fact contained in the statement of claim must be taken to be admitted. I think that rules 17 and 20 of Order XIX. justify me in so holding.

Feb. 26. The notice of trial was headed, "In the High Court of Justice, Chancery Division, V. C. *Hall*, *Harris* v. *Gamble*, 1877, H. 97"—and then proceeded: "Take notice of trial of this

(1) 6 Ch. D. 748.

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action by a Judge in *Middlesex*, for the 17th day of September, 1877." After the notice of trial had been served the action was transferred to the list of Mr. Justice *Fry*. It was objected by the Registrar that the notice ought to have been for trial "by the V. C. *Hall* at *Lincoln's Inn*," and he declined to draw up the judgment without the direction of the Court.

Dunning, for the Plaintiffs, now mentioned the matter, and referred to Rules of Court, 1875, Order XXXVI., r. 8, and Form 14 in Appendix B.

FRY, J.:—

I think the notice is sufficient, and that the judgment should be drawn up.

Solicitors for Plaintiffs: *J. & R. Gole.*

FRY, J.
1878
March 19.

ROBINSON *v.* CHADWICK.

[1876 R. 147.]

Practice—Discontinuance—Test Action—Refusal of Plaintiff to proceed with Trial—Rules of Court, 1875, *Order* XXIII.; *Order* XXXVI., *r.* 19.

When an action, which had been made a test action (for the purpose of deciding the rights of the Plaintiffs in a number of similar actions against the same Defendants), came on for trial, the Plaintiff declined to proceed, on the ground that he was not in a fit state of health to attend and be examined as a witness. On a previous occasion he had moved for and obtained a postponement of the trial, on the ground of his ill-health. A week before the trial an application by the Plaintiff in Chambers to stay all proceedings in the action had been refused by *Malins*, V.C., on the ground that the Plaintiff was not *dominus litis*, but a trustee for the Plaintiffs in the other actions. At the trial the Plaintiff asked for a postponement, or that an order of discontinuance might be made under Rules of Court, 1875, Order XXIII.:—

Held, that the Court could not regard the rights of the Plaintiffs in the other actions, but must act as if the Plaintiff had not appeared at the trial, and must dismiss the action with costs.

Statement.

THIS was an action commenced on the 11th of July, 1876, by a shareholder in a company in voluntary liquidation, claiming damages from the Defendants, who had been the promoters of the

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company, for an alleged misrepresentation in the prospectus issued on the formation of the company, whereby the Plaintiff was induced to apply for shares. There were seventy-seven other similar actions brought by other shareholders against the same Defendants. On the 23rd of February, 1877, upon the application to Vice-Chancellor *Malins* of the Plaintiffs in all the actions, on the undertaking of the Plaintiffs in all the actions respectively that, so far as they were respectively concerned, the action of *Robinson* v. *Chadwick* should be treated as a test action, and decide their rights in all the other actions respectively as against themselves, but, if the Defendants in any of the other actions should decline to accept the judgment in *Robinson* v. *Chadwick* as deciding the other actions, or any of them, then, as to any or such of the other actions in which the Defendants should decline to accept the judgment in the action of *Robinson* v. *Chadwick*, such other actions were to go to trial respectively, and the Plaintiffs in the test action and in *Smith* v. *Chadwick* (another of the actions) respectively undertaking that those actions respectively should be prosecuted with due diligence, it was ordered that the time for the delivery of the statement of claim in the actions respectively, other than the test action and *Smith* v. *Chadwick*, should be enlarged until fourteen days after judgment should have been given in the test action on the trial thereof, or until further order. When this order was made the statements of claim in *Robinson* v. *Chadwick* and *Smith* v. *Chadwick* had been delivered. The test action was afterwards transferred to Mr. Justice *Fry* for trial. On the 15th of February, 1878, the trial was postponed to the 15th of March, on the application of the Plaintiff, upon medical evidence that he was in a state of ill-health, and not fit to be examined as a witness in Court. On the 8th of March the Plaintiff took out a summons in the Chambers of Vice-Chancellor *Malins* to stay all further proceedings in the action on payment of costs, but the Vice-Chancellor refused the application, on the ground that, having regard to the order of the 23rd of February, 1877, the Plaintiff was not *dominus litis*, but was in the position of a trustee for the Plaintiffs in the other actions. The action was in the paper this day for trial. An affidavit of a medical man was produced to shew that the Plaintiff was in such a state of health

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FRY, J. 1878 ROBINSON v. CHADWICK. Argument.

that it would be dangerous for him to be examined as a witness in Court. No notice of motion had been given to postpone the trial.

Millar, for the Plaintiff:—

The Plaintiff is willing now to proceed with the action if the trial is postponed for a month, and if the Defendants will consent to his examination being taken by a commission. He is not in a fit state of health to be examined in Court. When the application to stay proceedings was made the Plaintiff had not been able to obtain from the Plaintiffs in the other actions a satisfactory indemnity against costs, but since then a satisfactory arrangement has been made. If the trial is not postponed the action ought not to be dismissed, because that would affect the rights of the other Plaintiffs, for whom, as the Vice-Chancellor held, the Plaintiff is a trustee. The Court has power under Rules of Court, 1875, Order XXIII., to make at any time an order for the discontinuance of the action, on such terms as it thinks just. Such an order will be in the nature of a nonsuit, and will not affect the rights of the other Plaintiffs.

Romer, for the Plaintiffs in the other actions, desired to support the application.

FRY, J., refused to hear him.

Kay, Q.C., and *Russell Roberts*, for the Defendants, asked that the action might be dismissed with costs, unless the Plaintiff would proceed with it now.

Millar declined to proceed.

Judgment.

FRY, J.:—

The Plaintiff candidly states that he is not prepared now to go on with his action, and he asks that the trial may be postponed for a month. He says that the action has, by an order made in it and other actions, been made what is called a test action, that is, that other persons have agreed to be bound by the result of it. I have nothing to do with that order. I have simply the action of

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Robinson v. *Chadwick* before me, and I discard any consideration of the rights of other persons than the parties to that action. Then it is said that the Plaintiff is in ill-health, and not able to attend in Court and be examined. The trial has been already postponed, and moreover the Plaintiff has recently applied to Vice-Chancellor *Malins* to stay all the proceedings in the action, and that application has been refused, and he now asks for a further postponement of the trial, so that he may be able to go on with the action. He made his choice; he did not apply in due time for a postponement of the trial, but he made that application to the Vice-Chancellor, and he failed. He declines now to proceed, and I can only deal with the case as if he had not appeared at the trial, as, indeed, in substance, he has not. I shall make an order, under rule 19 of Order XXXVI., dismissing the action with costs.

Solicitors for Plaintiff: *Bischoff, Bompas, & Bischoff.*
Solicitor for Defendants: *H. T. Chambers.*

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C. J. B.

1878

March 11.

In re HINKS. *Ex parte* BERTHIER.

Execution Creditor—Trader—Action—Judgment signed for more than £50—Execution issued for less than £50—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.

A creditor who has sued a trader for a debt, and who has signed judgment for upwards of £50, may, by issuing execution for less than £50, avoid the operation of sect. 87 of the *Bankruptcy Act*, 1869.

Statement.

THIS was an appeal from an order of the County Court at *Brighton*.

On the 26th of February, 1878, the Appellants *Berthier & Cox* issued a writ against the debtor *Hinks*, a trader at *Brighton*, to recover £50 due on a promissory note. In this action they obtained judgment on the 11th of February for £50 2*s.* 6*d.* and £4 6*s.* costs, together £54 8*s.* 6*d.* They proceeded to issue execution; but in order to avoid the operation of the 87th section of the *Bankruptcy Act*, 1869, they indorsed the writ for £43 only; and it was not disputed that thus the whole of the execution debt and costs would be brought below £50.

On the 16th of February *Hinks* filed a liquidation petition, and on the same day an order was made restraining the action.

On the 25th of February a motion to discharge the order of the 16th of February was refused. This was the order appealed from.

Argument

E. Cooper Willis, and *Whiteway*, for the Appellants, referred to *Ex parte Liverpool Loan Company* (1); *Ex parte Lovering* (2); *Ex parte Reya* (3).

The CHIEF JUDGE called upon

Finlay Knight, for the Respondent:—

The distinction between *Ex parte Reya* and this case is that there the creditor signed judgment for less than £50. Here he

(1) Law Rep. 7 Ch. 732. (2) Law Rep. 17 Eq. 452.
(3) 6 Ch. D. 332.

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signed judgment for more than £50, though he issued execution for less. Hence the 87th section applies.

BACON, C.J.:—

The reading of the statute is—"Where the goods of any trader have been taken in execution for a sum exceeding fifty pounds"—not where they have been taken "in respect of a judgment for a sum exceeding fifty pounds."

I cannot entertain the distinction that has been attempted to be drawn. The judgment may be for £5000; but what the Act of Parliament means is, that if the execution be for a sum less than £50, the clause has no application.

Here the writ of execution was indorsed for less than £50, and the creditor is entitled to the proceeds.

The appeal must be allowed with costs.

Solicitors: *McDiarmid; Brandreth & Gray.*

END OF VOL. VII.

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2. —— *Action for—Creditor—Executor paying one Creditor in full after Writ—Conflicting Rules of Law and Equity—Judicature Act*, 1873, *s.* 25, *sub-s.* 11.] Where an executor or administrator, after the commencement of a creditors' administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under *Judicature Act*, 1873, s. 25, sub-s. 11, and he will accordingly be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment. To prevent such payments being made in any such action, the Plaintiff should, immediately upon issuing the writ, apply for and obtain a receiver. *In re* RADCLIFFE. EUROPEAN ASSURANCE SOCIETY *v.* RADCLIFFE - - - 733

ADMINISTRATION—*continued.*

3. —— *Action for—Legal Personal Representative—Refusal to sue—Action by Residuary Legatee.*] Mere refusal by a legal personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the legal personal representative and the alleged debtor to the estate. *Bowsher* v. *Watkins* (1 Russ. & My. 277) and *Hilliard* v. *Eiffe* (Law Rep. 7 H. L. 39) commented on. The circumstances which would suffice to induce the Court to answer in the affirmative an inquiry whether proceedings ought to be instituted, will in general suffice to entitle a person beneficially interested to sue in his own name. YEATMAN *v.* YEATMAN - - 210

4. —— *Action for—Costs — Lapsed Share of Personalty—Exoneration.*] A testator bequeathed a sum of consols and the residue of his personal estate to trustees to hold in equal fifths upon certain trusts. One fifth share lapsed. In a suit for the administration of the testator's real and personal estate:—*Held*, that the costs of the suit were payable out of the general personal estate, and not primarily out of the lapsed share. *Trethewy* v. *Helyar* (4 Ch. D. 53) followed. FENTON *v.* WILLS - - - - 33

5. —— *Action for—Costs—Marshalling—Residue of Real and Personal Estate given to Charities—Payment of Legacies and Costs.*] A gift of a share of real and personal residue to a charity having failed except as to pure personalty:—*Held*, that the costs of an administration suit ought nevertheless to be borne by the general estate. The rule laid down in *Gowan* v. *Broughton* (Law Rep. 19 Eq. 77) dissented from. BLANN *v.* BELL - - - - - 382

6. —— *Locke King's Act* (17 & 18 *Vict. c.* 113) —*Mortgage comprising Realty and Personalty—Devise of Realty—Residuary Legatee—Payment of Mortgage Debt.*] Where real and personal estate are comprised in the same mortgage, the mortgage

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ADMINISTRATION—*continued.*
debt must, as between the devisees of the realty and the legatees of the personalty, be borne rateably by the real and personal estate subject thereto, and the real estate is not, under *Locke King's Act*, primarily liable to the payment thereof. TRESTRAIL *v.* MASON - .. - - 655
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ANNUITY—*Forfeiture on Bankruptcy—Cesser on doing or permitting any Act whereby the Annuity would be aliened.*] A testator gave an annuity to his son, with a proviso that if he should "at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner whatsoever," the annuity should cease. The son neglected to comply with a debtor's summons, and was thereupon adjudicated a bankrupt:—*Held*, that the annuity ceased. *Ex parte* EYSTON. *In re* THROCKMORTON - - - - - C. A. 145
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BANKRUPTCY — *Chose in Action—Equitable Assignment—Undertaking to "pay over" Dividends on a Proof—Notice—Bankruptcy Act*, 1869, s. 15, *sub-s.* 5.] *A.*, for good consideration, gave *B.* a written undertaking to "pay over" to him all dividends that he should receive on his proof against a bankrupt's estate. *A.* became bankrupt and *B.* then gave notice of his claim to the trustees in the first bankruptcy:—*Held*, that there was a good equitable assignment of the dividends, and that *B.* was entitled as against *A.'s* trustee in bankruptcy. *In re* IRVING. *Ex parte* BRETT 419

2. —— *Composition—Dominion over Property—Evidence of Payment of Instalments.*] A debtor who has filed a petition for liquidation in bankruptcy and has effected a composition with his creditors, has complete dominion over his property, and full power to dispose of it until, upon action taken by his creditors under the *Bankruptcy Act*, 1869, s. 126, the composition has been set aside and the debtor adjudged a bankrupt; and a purchaser from him is not bound to inquire as to the payment of instalments under the composition. *In re* KEARLEY AND CLAYTON'S CONTRACT [615

3. —— *Composition—First Instalment paid by Sureties—Failure to pay Second Instalment—Rights of Creditors—Bankruptcy Act*, 1869, s. 126.] The creditors of a debtor passed resolutions accepting a composition of 5*s.* in the pound, payable in two instalments of 4*s.* and 1*s.*, the first instalment to be paid in five months, and to be secured by the promissory notes of the debtor and three sureties; the second instalment to be paid in two years, and to be secured by the promissory notes of the debtor alone. The first instalment was paid by the sureties, and exceeded in amount the assets of the debtor as appearing by his statement of affairs. The debtor, having failed to pay the second instalment, was adjudicated a bankrupt on the application of a creditor under the 126th section:—*Held*, on appeal, that the adjudication could not be sustained, for that the creditor failed to shew that there were legal difficulties, or that the creditors were prejudiced; and that the remedy of the creditor was to sue at law for the remaining instalment of the composition. *In re* SHIERS. *Ex parte* SHIERS - - - - 416

4. —— *Composition — Single Creditor, Agreement for subsequent Payments to—Payments thereunder, Recovery back of—Fraud on Creditors.*] Where a creditor at the time of signing a composition deed under the 192nd section of the *Bankruptcy Act*, 1861, took from the debtor a private agreement that the debtor should make future payments on his account:—*Held*, that the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder. *In re* LENZBERG'S POLICY - - - - - 65

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BANKRUPTCY—*continued.*

5. —— *Covenant to settle — Bankruptcy Act*, 1869, *s.* 91—*Trader's Settlement—Interest in Property.*] A trader, who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself and the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him and the remainder to other children, and subsequently he became bankrupt:—*Held*, that the covenant was not void under sect. 91 of the *Bankruptcy Act*, 1869. *In re* ANDREWS' TRUSTS - - **635**

6. —— *Disclaimer of Lease by Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Right to remove Fixtures.*] After the trustee in a bankruptcy has executed a disclaimer of a lease vested in the bankrupt, he is not entitled, even though he be in possession of the leasehold premises, to remove the tenant's fixtures.—The effect of the disclaimer is to give the landlord an absolute title to the fixtures as from the date of the order of adjudication. *Ex parte* STEPHENS. *In re* LAVIES [C. A. **127**

7. —— *Execution for Sum exceeding £50—Trader—Adverse Claim—Interpleader Summons—Order for Sale and Payment to Execution Creditor—Subsequent Bankruptcy of Debtor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71). *s.* 87.] The goods of a trader were seized on the 19th of August under an execution in respect of a judgment debt of £115. The holder of a bill of sale for £37 10*s.* claimed the goods, and the sheriff issued an interpleader summons. On the 28th of August a Judge ordered that the sheriff should sell the goods, and out of the proceeds pay £37 10*s.* into Court, and pay the balance to the execution creditor, and that an issue should then be tried between him and the bill of sale holder as to the property in the goods at the time of the seizure. On the 7th of September, before the sheriff had sold, the trader filed a liquidation petition:—*Held*, that the trustee in the liquidation was entitled to the goods, subject to the claim of the bill of sale holder:—*Parsons* v. *Lloyd* (Law Rep. 1 Ex. 307, n.) questioned. *Ex parte* HALLING. *In re* HAYDON - **C. A. 157**

8. —— *Execution Creditor—Trader—Action—Judgment signed for more than £50—Execution issued for less than £50—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.] A creditor who has sued a trader for a debt, and who has signed judgment for upwards of £50, may, by issuing execution for less than £50, avoid the operation of sect. 87 of the *Bankruptcy Act*, 1869. *In re* HINKS. *Ex parte* BERTHIER - - **882**

9. —— *Fraud on Bankruptcy Law—Proviso for Increase of Security in event of Mortgagor's Bankruptcy — Mortgage — Attornment Clause — Sham Rent—Distress—Bankruptcy of Mortgagor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 34—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36).] A mortgage of smelting works to secure the repayment of an advance of £55,000, contained, in addition to the ordinary clauses, a covenant by the mortgagee that, if the interest was punctually paid as it became due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagor should not have become bankrupt or

BANKRUPTCY—*continued.*

have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of the mortgaged property, and should not have ceased to carry on his business thereon, then the mortgagee would not for a period of five years require payment of the principal. And the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged property at the yearly rent of £20,000, to be paid half-yearly on the days on which the interest on the mortgage debt was made payable. The deed was not registered under the *Bills of Sale Act*. It was admitted that the letting value of the property was not more than £3000 per annum. Four months after the execution of the mortgage the mortgagor filed a liquidation petition, and the mortgagee afterwards claimed the right to distrain the chattels upon the mortgaged property for a year's rent under the attornment clause:—*Held*, that the arrangement was a mere device to give the mortgagee an additional security in the event of the mortgagor's bankruptcy, and was, therefore, in that event, void, as a fraud upon the bankrupt law, and that sect. 34 did not protect a distress levied for a mere sham rent.—The mortgagee was, therefore, restrained from levying a distress for the rent. *Ex parte* WILLIAMS. *In re* THOMPSON - **C. A. 138**

10. —— *Liquidation—Registration of Resolutions—Debtor having no Assets—Abuse of Procedure of Court—Examination of Debtor at Meeting — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 4—*Bankruptcy Rules*, 1870, *r.* 301.] A debtor who has practically no assets distributable among his creditors is not entitled to file a liquidation petition.—Resolutions for a liquidation by arrangement passed under such circumstances ought not to be registered, even though they do not include a discharge to the debtor.—*Ex parte Walter* (2 Ch. D. 326) explained.—The answers given by a debtor at a liquidation meeting to questions put to him by the creditors respecting his affairs are to be taken as part of his statement of affairs. *Ex parte* AARONSON. *In re* AARONSON [C. A. **713**

11. —— *Liquidation—Resolution to discharge Debtor—Vacating Registration—Mala fides on part of Debtor—Time for appealing—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 9—*Bankruptcy Rules*, 1870, *rr.* 143, 295, 302—*Undischarged Debtor—Costs.*] When a resolution to discharge a liquidating debtor has been passed by the statutory majority and registered, the registration will be vacated if it is shewn that any one of the votes of the majority was obtained by a malpractice on the part of the debtor, such as bribing the creditor to give his vote, even though, if the vote thus procured were struck off, the statutory majority in favour of the discharge would remain:—An application to vacate the registration of a resolution on the ground of fraud or *mala fides* is not an appeal to which the limit of twenty-one days imposed by rule 143 applies. An undischarged debtor will not be ordered personally to pay the costs of his unsuccessful appeal beyond the deposit. *Ex parte* BAUM. *In re* BAUM C. A. [719

12. —— *Order and Disposition—Lien—Bank-*

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BANKRUPTCY—*continued.*

ruptcy Act, 1869, *s.* 15, *sub-s.* 5.] A horsedealer supplied a customer with a pair of horses, for which she paid £170, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the £170, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses:—*Held*, that the horses were in the bankrupt's order and disposition; and that the customer could not enforce a lien on them as against the trustee in bankruptcy. *Ex parte* ROY. *In re* SILLENCE - - 70

13. —— *Proof—Debt contracted after Notice of Act of Bankruptcy available for Adjudication—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] The expression "notice of any act of bankruptcy available for adjudication" used in sect. 31 of the *Bankruptcy Act*, 1869, means notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered. Therefore a creditor who contracted a debt with a bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of the petition upon which the adjudication is made is not precluded by sect. 31 from proving under the adjudication. *Ex parte* CROSBIE. *In re* BEDELL [C. A. 123

14. —— *Undischarged Bankrupt—Enforcing unpaid Debt against Bankrupt's Property—Deceased Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 54—*Bankruptcy Rules*, 1870, *r.* 183.] Sect. 54 of the *Bankruptcy Act*, 1869, does not enable the Court to sanction proceedings under it against the estate of a deceased undischarged bankrupt. *Ex parte* KELLY. *In re* SIMMONS [C. A. 161

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BILL OF EXCHANGE—*Foreign Bill of Exchange—Re-exchange—Liability of Acceptor.*] The drawer of a bill of exchange in a foreign country accepted in *England* is entitled, upon the bill being dishonoured and protested, to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange. *In re* GENERAL SOUTH AMERICAN COMPANY - - - 637

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See COVENANT. 3.

CHARITY—*Mortmain—Will—Construction.*] A bequest to the corporation of *T.* of a sum of £3000 Consols, of which £1000 was to be expended "in the erection of a dispensary, which is so urgently needed there," and the remaining £2000 to be invested as "an endowment fund for the said dispensary":—*Held*, void under 9 Geo. 2, c. 36, although the corporation held land in mortmain at *T.* which was available for the purposes of the bequest. *In re* COX. COX *v.* DAVIE - **204**

2. —— "*Poor Kindred*"—*Meaning of* "*Poor*" *or* "*Poorest*"—*Least Wealthy of a Wealthy Class excluded—Charity Scheme—Cy-près.*] To constitute a gift to the "poor" or "poorest" of a specified class of persons a charitable gift, it must be construed as a gift to the actually poor, and not to the least wealthy of a wealthy class. *Dictum* of *Wickens*, V.C., in *Gillam* v. *Taylor* (Law Rep. 16 Eq. 581) disapproved of. *Isaac* v. *Defriez* (Amb. 595) explained. A testator, who died in 1628, gave, "for the use and benefit of the poorest of his kindred, such as were not able to work for their living, viz., sick, aged, and impotent persons, and such as could not maintain their own charge," the sum of £1000, to be laid out in the purchase of lands of the value of £60 a year at least, the rents and profits thereof to be distributed yearly among them by trustees; and the testator declared his meaning to be that in distributing his estate and goods "to the poor charitable uses," those of his kindred which were poor, aged, impotent, or any other way unable to help themselves should be chiefly preferred.—After the testator's death the £1000 legacy was laid out by his trustees in the purchase of a freehold estate, which they let on building leases under powers contained in an Act passed in 1772.—In 1875, in consequence of the rapidly-increasing income of the estate and the large number of the testator's kindred, of whom some only could be considered proper objects of charity, a scheme was proposed for the future regulation of the charity created by the will, whereupon the question arose whether any and what portion of the income of the charity property could or ought to be appropriated to the benefit of any persons not being kindred of the founder:—*Held*, that the testator's gift must be read as a gift to charitable objects, such objects being persons necessitous and disabled according to the definition in his will, but with a prior charge

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CHARITY—*continued.*
in favour of such of his kindred as should be necessitous and disabled; and therefore that, subject to this prior charge, the income of the estate was applicable for the benefit of charitable objects other than kindred of the testator. ATTORNEY-GENERAL *v.* DUKE OF NORTHUMBERLAND - 745
—— Mortmain—Marshalling - - 382
See ADMINISTRATION. 5.

CHOSE IN ACTION—Dividends on proof in bankruptcy - - - - 419
See BANKRUPTCY. 1.
—— Married woman - - - 48, 423
See HUSBAND AND WIFE. 1, 2.

CLASS—Gift to "poorest of his kindred" - 745
See CHARITY. 2.
—— Period of ascertaining - 322, 665, 693
See WILL. 5, 6, 7.
—— Survivorship - - - - 255
See WILL. 8.

COMMISSION—To examine witnesses - 394
See PRACTICE. 32.
—— To determine boundaries - - 871
See LANDLORD AND TENANT. 1.

COMMON—*Pannage.*] A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or an owner of land who keeps pigs, to go into the wood of the grantor and allow the pigs to eat the acorns or beech-mast which have fallen to the ground, and does not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber when ripe. CHILTON *v.* CORPORATION OF LONDON - 562

2. —— *Profit à prendre—Right of Lopwood—Grant to Inhabitants of a Parish—Corporation—Action by one Inhabitant—"Inhabitant"—Right claimed by Occupier of House illegally erected—Presuming Act of Parliament.*] A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by Crown grant or Act of Parliament.—A grant by the Crown of a *profit à prendre* out of Crown lands to the inhabitants of a parish, constitutes the inhabitants a corporation *quoad* the grant, and an action to establish any such right is maintainable only by the inhabitants as a corporation, and not by an individual inhabitant suing on his own behalf alone:—*Semble*, a grant to the "inhabitants" of a parish lying within a manor of a *profit à prendre* out of the manorial waste, means a grant to the inhabitants of houses lawfully erected within the parish, and does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed.—The Court will not presume a non-existent Act of Parliament as an origin for an alleged right.—*Willingale* v. *Maitland* (Law Rep. 3 Eq. 103) explained. CHILTON *v.* CORPORATION OF LONDON - - - 735
—— Copyhold - - - - 689
See COPYHOLD. 1.

COMPANY—*Contract by Promoters—Ratification.*] A company can ratify a contract which was made by its promoters when the company was not in existence.—Observations on *Melhado* v. *Porto Allegre, &c., Railway Company* (Law Rep. 9 C. P. 503). SPILLER *v.* PARIS SKATING RINK COMPANY [388

2. —— *Execution Creditor—Levy by Sheriff before Presentation of Winding-up Petition—Injunction—Companies Act*, 1862, *ss.* 87, 163.] Proceeding to a sale under an execution perfected by seizure before the commencement of a winding-up is a "proceeding" within the 87th section of the *Companies Act*, 1862, and will be restrained if the Court has reason to doubt the *bona fides* of the transaction. *In re* PERKINS BEACH LEAD MINING COMPANY - - - - - 371

3. —— *Unlimited Company—Provisional Registration under* 7 & 8 *Vict. c.* 110—*Transfer of Shares to create Votes—Power of Directors to refuse Transfers.*] A company with unlimited liability was formed in 1843 under a deed of settlement, and was afterwards provisionally registered under 7 & 8 Vict. c. 110. By their deed of settlement no shareholder was to have more than twenty votes, however large the number of shares held, and the directors had power to approve or disapprove of any person proposed by a shareholder as a transferee of his shares. A difference arose among the shareholders as to the management of the company, and the Plaintiff, who was a large shareholder, transferred some of his shares to one person for value, and other shares to another person as trustee for himself, in order to increase his voting power. The directors refused to approve of the transfers, not from any personal objection to the transferees, but on the ground that the transfers were colourable, and were intended to increase the votes of the transferor:—*Held*, that the company was not a mere partnership, but came within the laws applicable to joint stock companies; and that the directors had no power to refuse a transfer, which was a right of property, except upon personal objection to the transferee. They were therefore ordered to approve of the transfers.—An inquiry was also directed as to damages. MOFFATT *v.* FARQUHAR - - 591

4. —— *Winding-up—Contract with the Promoters of the Company—Companies Act*, 1867, *s.* 25—*Paid-up Shares—Variance between Memorandum and Articles of Association.*] A syndicate was formed for the purchase of a coal mine from *A.*, with a view to forming a company to take the mine. The mine was accordingly agreed to be conveyed by *A.* to *B.* (who was to establish a company for taking over the mine) in consideration of £66,000, of which £42,000 were to be in paid-up shares of the intended company. The memorandum of association stated that the capital was to be £200,000 in 20,000 shares of £10 each. The articles of association stated that the mine belonged to the persons named in the schedule of an agreement to be executed immediately after the registration of the articles, and that 15,000 paid-up shares were to be allotted to them in the proportions mentioned in the schedule. Soon afterwards *B.* declared himself a trustee for the company, and subsequently to this the agreement referred to in the articles was executed, and by it *B.* declared that he had entered into the agreement

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COMPANY—*continued.*

for the purchase of the mine on behalf of the persons named in the schedule (being *A.*, the members of the syndicate and their nominees), and that they declared they held the mine in trust for the company; and that 15,000 paid-up shares were to be allotted to them in the proportions therein mentioned. This agreement was registered under the 25th section of the *Companies Act*, 1867. *A.*, besides the shares representing the purchase-money of the mine, purchased 3520 from one of the members of the syndicate and other persons. The directors issued a large number of debentures on the security of the property of the company, but no other shares were issued except those 15,000 paid-up shares. The company being wound up:—*Held* (reversing the decision of *Malins*, V.C.), that the registered agreement was made *bonâ fide* and for good consideration, and was a sufficient contract in writing within the 25th section of the *Companies Act*, 1867; and that there was nothing in the circumstances to estop *A.* from claiming the shares which he had purchased, as paid-up shares.—Whether a memorandum in writing under which a person is to take paid-up shares without any consideration, is a contract within the 25th section of the *Companies Act*, 1867, *Quære*:—*Held*, also, that there was no inconsistency between the memorandum and articles of association in the fact that the memorandum stated the capital as consisting of 20,000 shares, and the articles stated that 15,000 of these shares were to be taken as paid up.—*Crickmer's Case* (Law Rep. 10 Ch. 614) distinguished. *In re* WEDGWOOD COAL AND IRON COMPANY. ANDERSON'S CASE - - - - - - C. A. 75

5. —— *Winding-up—Director—Qualification—Condition Precedent.*] The articles of a limited company, after naming the original directors, gave to the directors for the time being power to appoint new directors at any time before the first general meeting. It was then provided that no person should be qualified to be a director who was not a holder of shares in the company of the nominal value of £500; and that no person except the original directors, and such person as might be appointed by them, should be qualified to be a director who had not been a holder in his own right of such shares for at least six months.—*J.* was appointed a director by the original directors, and attended several meetings of the board, but never applied for or acquired any shares, and when the company was wound up his name was not on the register of shareholders:—*Held* (affirming the decision of the Master of the Rolls), that the holding of the necessary number of shares was a condition precedent to the election of a director, and that *J.'s* election was therefore void; that his acting as director was no evidence of a contract to take the shares; and that his name could not be placed on the list of contributories.—*Hamley's Case* (5 Ch. D. 705) approved. *In re* PERCY AND KELLY NICKEL, COBALT, AND CHROME IRON MINING COMPANY. JENNER'S CASE - - C. A. 132

6. —— *Winding-up—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Fully paid-up Shares—Certificate—Estoppel.*] Shares in a limited company were issued as fully paid-up shares, by virtue of a contract not registered as required by the *Companies Act*, 1867, *s.* 25. The company issued certificates of these shares as fully paid-up shares. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid up on the faith of the certificates. The company having been ordered to be wound up, the official liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid:—*Held* (reversing the decision of *Hall*, V.C.), that, as against a transferee who took the shares without notice that they had not been paid up in cash, the company was estopped by the certificates from saying they had not been so paid up, and that the official liquidator was in the same position.—*Blyth's Case* (4 Ch. D. 140) distinguished. *In re* BRITISH FARMERS PURE LINSEED CAKE COMPANY - - - - - C. A. 533

7. —— *Winding-up—Insurance Company—Policy-holders—Limited and unlimited Liability—Marshalling—Compromise by Contributories—Calls for Costs—Exclusive Liability of Contributories who have not compromised—Companies Act*, 1862, *s.* 38, *sub-s.* 6, *s.* 160.] In the case of an insurance company in liquidation, whose assets are limited as regards policy-holders and unlimited as regards other creditors, sect. 38, sub-sect. 6, of the *Companies Act*, 1862, is only intended to protect the contributories as against the claims of the policy-holders, and does not affect the liability of contributories who have not compromised their liabilities, under sect. 160, to pay the whole of the costs of the liquidation, although the whole of the nominal share capital has been called up.—The deed of settlement of an insurance company registered in 1854 under 7 & 8 Vict. c. 110, provided that every policy issued by the company should contain a proviso limiting the claims of the policy-holder to the amount of the share capital, but left the liabilities of the shareholders in other respects unlimited.—All the policies issued by the company contained the required proviso.—In 1868 the company was ordered to be wound up.—During the liquidation the whole of the nominal share capital was called up, and several of the contributories compromised their liabilities by agreements with the liquidator in manner provided by sect. 160 of the *Companies Act*, 1862, and Rules of 1862, Sched. III., Form No. 50.—The liquidator having, for the purpose of raising a fund for the payment of the past and future costs of the liquidation, made a further call on those contributories who had not compromised:—*Held*, that those contributories were not entitled to require that the amounts received under the compromises should be marshalled between the liability for costs and the liability under policies; and that the contributories who had not compromised alone remained liable for the costs of the liquidation. *In re* ACCIDENTAL DEATH INSURANCE COMPANY [568

8. —— *Winding-up—Leasehold Premises, Retention of, by Company—Convenience of the Winding-up—Rent accrued before Commencement of the Winding-up—Rent accrued after—Leave to distrain.*] A company in course of liquidation retained for the convenience of the winding-up the possession of leasehold premises of which they

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COMPANY—*continued.*

were in occupation as assignees of a lease containing the usual proviso for re-entry by the lessors:—*Held*, that leave should be given to the lessors to distrain for rent accrued due after the commencement of the winding-up, but not for rent accrued due before that time, as to which they must prove as creditors in the winding-up. *In re* NORTH YORKSHIRE IRON COMPANY - - 661

9. —— *Winding-up—Poor-rate—Priority over other Debts of Company—Applying Bankruptcy Rules to Company in Liquidation—Bankruptcy Act*, 1869, *s.* 32—*Judicature Act*, 1875, *s.* 10.] The rule in bankruptcy giving local rates due from the bankrupt priority over his other debts (*Bankruptcy Act*, 1869, s. 32) does not, under sect. 10 of the *Judicature Act*, 1875, apply to the case of a company in liquidation *In re* ALBION STEEL AND WIRE COMPANY - - - - 547

—— Deed reciting advances—Specialty creditor *See* SPECIALTY CREDITOR. [573

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—— Promoters of company - - 75, 368
See COMPANY. 1, 4.

—— Sale of land - - - 42, 683
See VENDOR AND PURCHASER. 3, 4.

CONTRIBUTORY—Winding-up 132, 533, 568
See COMPANY. 5, 6, 7.

COPYHOLD — *Prescription — Custom — Profit à prendre—Occupiers—Copyholders—Manor.*] The occupiers of lands under the copyholders of a manor claimed, and by a by-law were declared entitled to, certain rights of common over the lands of the manor. Part of the lands had been sold to a railway company, and the occupiers claimed to share in the purchase-money:—*Held*, that the claim could not be maintained. It could

COPYHOLD—*continued.*

only be made by custom, by grant, or by prescription. There could be no such custom giving a *profit à prendre in alieno solo*; there was no grant; and there could be no right by prescription, inasmuch as the claim would be against the owner of the land in respect of which the claim was made. AUSTIN *v.* AMHURST - - - - 689

2. —— *Tenure for Life with Power to nominate Successor—Devise of Legal Estate to Trustees—Equitable Limitations of Inheritance.*] By the custom of the manors of *Y.*, *P.*, and *S.*, the tenant of a copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees to the use of his grandson *A.* for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of *A.* and their heirs as tenants in common, with remainder to the use of the Plaintiffs. By a codicil the testator, after reciting that he had ascertained that his "said copyhold estates" were held of the manors of *P.* and *S.*, directed that "all his said copyhold estates within the manor of *P.* and *S.*" should be held by his said trustees to the uses and upon the trusts in his said will declared, if and so far as the customs of the said respective manors would warrant or authorize; and if the custom of the said manors or either of them did not warrant or authorize the entail created by his said will, then and in that case his said grandson *A.* and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the said manors. *A.* was admitted tenant for his life, and nominated the Defendant as his successor, who was admitted accordingly. On a bill filed by the Plaintiffs to carry into effect the trusts of his will:—*Held*, first, that the trustees took the legal estate in the copyholds held of the manor of *Y.*, and ought to have been admitted instead of *A.*, and that all the beneficial limitations in the will were equitable interests. Secondly, that the codicil had no reference to the copyholds held of the manor of *Y.*; and that even if it did refer to them, it did not revoke the equitable limitations of the will. Thirdly, that although by the custom of the manor the tenements were only held for life with power of nominating a successor, the testator had power to dispose of the equitable inheritance by giving successive equitable interests.—The decision of *Hall*, V.C., affirmed. ALLEN *v.* BEWSEY [C. A. 453

COPYRIGHT—*Musical Composition—Registration—Copyright Act* (5 & 6 *Vict. c.* 45)—*International Copyright Act* (7 *Vict. c.* 12), *s.* 6] On the 10th of March, 1869, an opera composed by *O.*, a French subject, was first represented at a theatre in *Paris*. On the 28th of March, 1869, a pianoforte arrangement of the music of the opera, made by *S.* with *O.'s* consent, was published at a shop in *Paris*, and about the same time an arrangement by *S.* for piano and voices was also published. In June, 1869, *O.* assigned the opera and the

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COPYRIGHT—*continued.*
copyright and the right of public representation to *B.*, an English subject, and handed over to him the MS. score. Upon this assignment a registration was made under the *International Copyright Act* (7 Vict. c. 12), s. 6, and a copy of the pianoforte arrangement was deposited at *Stationers' Hall*. The entry on the register gave the title of the opera, the name of the composer, the name of the proprietor of the copyright (describing him as the proprietor of the copyright in the music and the right of publicly performing such music), the time and place of first publication, "28th March, 1869, *Rue* ——, *Paris, France*," and also the time and place of first representation, "*Théâtre* ——, *Paris, France*, 10th March, 1869," but did not mention the name of *S.*, nor did it in any way, except by the entry of the time and place of first publication, refer to the pianoforte arrangement. In August, 1869, four separate instrumental parts of the opera were published, but the rest of the score remained in MS.—In 1874, *F.* brought out at his theatre in *London* an opera in English under the same title, and announced as with music by *O.*, a substantial part of the music of which was taken from one of the arrangements by *S.*—In a suit by *B* to restrain *F.* from infringing his copyright in the opera and sole right of public representation:—*Held*, by *Bacon*, V.C., that the registration was defective under the *International Copyright Act* (7 Vict. c. 12), in not mentioning the name of *S.* as the author of the pianoforte arrangement, the thing really registered, and from which alone *F.* had taken the music, and gave *B.* no title to sue for an infringement of his alleged right.—*Held*, on appeal, that what was intended to be registered was the opera by *O.*, and not the book containing the pianoforte arrangement by *S.*; and that as the proper entries for that purpose were made, the additional entry of a date applicable only to the arrangement by *S.*, and the deposit of the book containing that arrangement, did not invalidate the protection which would otherwise have been obtained of the sole right of performing the opera:—*Held*, further, that the omission of the Plaintiffs to deliver to the officer of the *Stationers' Company* a copy of the four instrumental parts which were published in August, 1869, did not invalidate the protection obtained by the registration, such publication not being a publication of the opera within the meaning of the statute 7 Vict. c. 12, and the convention with *France* under that Act:—*Held*, further, that a dramatic representation in which a substantial part of the music of *O.'s* opera was performed was an infringement of the sole right of publicly performing that music, though the operatic score was obtained by independent labour bestowed on the arrangement of *S.*, which was not protected.
BOOSEY *v.* FAIRLIE - - - C. A. 301

—— Registration—Pleading - - 842
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—— Bankruptcy—Undischarged debtor - 719
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—— Lien for—Solicitor - - 318, 495
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—— Metropolitan Paving Act—Investment of purchase-money - - - 184
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—— Severance of Defendants—Co-partners 781
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—— Solicitor—Negligence - - - 9
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—— Taxation after payment - - 625
See SOLICITOR. 3.

—— Trustee defending suit—Charges of fraud
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COUNTER-CLAIM—Set-off - - - 866
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COVENANT—*Restrictive Covenant—Assignee with Notice—Public-house—Covenant to buy Beer of one Brewer only—Implied Condition to supply good Beer.*] The lease of a public-house granted by a brewer to a publican contained a covenant by the latter for himself, his executors, administrators, and assigns, to purchase from the brewer all the beer consumed at that public-house, and also at another public-house at which the publican held a lease under a different landlord:—*Held*, that the covenant was binding in equity upon an assignee of the second public-house who had notice of the covenant.—*Keppell* v *Bailey* (2 My. & K. 517), so far as it is a decision that a restrictive covenant as to the use of land, which does not run with the land at law, is not binding in equity upon an assignee with notice, has been overruled by more recent cases.—The lease of the first public-house contained also a covenant by the brewer that he would supply the publican with all the beer required for consumption at both the public-houses, such beer to be of a specified quality and price:—*Held*, that the obligation of the lessee's covenant was conditional upon the performance by the lessor of his covenant.—The assignee of the lease of the second public-house borrowed money of the brewer upon the security of a mortgage of that lease, and in the mortgage deed he covenanted with the brewer to buy of him all the beer consumed at that

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COVENANT—*continued.*

public-house:—*Held*, that this covenant was subject to an implied obligation on the part of the brewer to supply good marketable beer. LUKER *v.* DENNIS - - - - - 227

2. —— *Restrictive Covenant — Lessee with Notice — Acquiescence — Substantial Damage.*] Where the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant.—An assignee of land with notice of a covenant is subject to the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case that in the other. RICHARDS *v.* REVITT - - - - 224

3. —— *Restrictive Covenant — Use of Land restricted to Purposes of Private Residence — Charitable Institution.*] The erection of a building, to be used for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions, *held* to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."—Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance.—*Roper* v. *Williams* (T. & R. 18) distinguished.—The decision of *Bacon*, V C., reversed. GERMAN *v.* CHAPMAN - C. A. 271

4. —— *Lessee—Assignment of Lease—Breach of Covenant—Form of Decree.*] In a suit by the assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the Court will direct merely payment on account of breaches of covenant already committed, and will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach. —*Ranelaugh* v. *Hayes* (1 Vern. 189) disapproved of. LLOYD *v.* DIMMACK - - - 398

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CURTESY—Equitable estate to separate use of wife - - - - - 288
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DECEPTION—Evidence of—Trade-mark - 848
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See PRACTICE. 1, 15.

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See PRACTICE. 32.

—— Notice of trial—Changing place of trial 390
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—— Trade-mark—Rectification of register 724
See TRADE-MARK. 2.

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EVIDENCE—*Action for Misrepresentation on Sale of Goods—Scienter—Belief as to Truth of Representation.*] In an action against a vendor for misrepresentation on the sale of goods, if it is shewn that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, he cannot be asked in chief whether he believed the representation to be true. HINE *v.* CAMPION - - - - - 344

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—— Sham rent—Mortgage - - - 138
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FRAUDS, STATUTE OF—*Agreement for Lease—Stipulation for Formal Contract—Specific Performance.*] By a written agreement the Defendant agreed with the Plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—*Held*, that there was no final agreement of which specific performance could be enforced against the Defendant. WINN *v.* BULL - - - - - - 29

2. —— *Declaration of Trust of Land—Writing—Signature—"Party by Law enabled to declare Trust"—Legal and Beneficial Owner—Unsigned Postcript to Signed Letter on separate Paper.*] When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of sect. 7 of the *Statute of Frauds*, is the beneficial owner only. *Tierney* v. *Wood* (19 Beav. 330) followed. The absolute beneficial owner of land vested in a trustee wrote a letter to the mother of her infant grandson. The letter was signed with the writer's initials. Inclosed in the same envelope, but on a separate piece of paper, was another document in the handwriting of the same person, and headed "Supplement." This document was not signed in any way. It commenced thus: "I had quite omitted to tell you," but it contained no other reference to the letter, and the letter in no way referred to it. It was alleged that the "supplement" contained a declaration of trust of the land in favour of the infant:—*Held*, that the "supplement" was not signed so as to satisfy the statute. KRONHEIM *v.* JOHNSON - - - 60

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GUARANTEE — *Construction — Consideration — Past Debts.*] The wife of a retail dealer who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you having at my request agreed to supply and furnish goods to *C.*" (her husband), "I do hereby guarantee to you the sum of £500. This guarantee is to continue in force for the period of six years and no longer":—*Held* (reversing the decision of *Fry*, J., that the guarantee was limited to goods actually supplied to the husband after it was given. MORRELL *v.* COWAN - - C. A. 151

HUSBAND AND WIFE—*Chose in Action of Wife—Desertion of Wife—Protection Order—Property acquired after Desertion—20 & 21 Vict. c. 85, ss. 21, 25—21 & 22 Vict. c. 108, s. 8—Reduction into Possession by Husband—Transfer of Shares into Joint Names.*] A married woman became in 1866 entitled, on the death of an intestate, to a share of his estate. Part of her share was paid by the administrator to the husband, and in 1867 some shares in a joint stock company, which had been appropriated by the administrator in respect of the remainder of the wife's share, were, with the assent of the husband and wife, transferred into their joint names. In May, 1874, the husband deserted the wife, and in November, 1874,

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HUSBAND AND WIFE—*continued.*

she obtained from the justices a protection order, by which her property and earnings acquired since the date of the desertion were protected from her husband. In 1876 the company resolved upon a voluntary liquidation, and the liquidator gave notice to the husband and wife that he was prepared to refund £900 in respect of the capital of the shares. The wife thereupon (suing as a *feme sole* under the protection order) commenced an action against the company and the husband, claiming payment of the £900 to her as a *feme sole*. The money was paid into Court:—*Held*, that the transfer into the joint names did not amount to a reduction into possession by the husband, and that the wife was entitled to the £900 as a *feme sole* under the protection order, as being property acquired by her after the desertion. NICHOLSON *v.* DRURY BUILDINGS ESTATES COMPANY - - - - - - - 48

2. —— *Chose in Action of Wife—Sale by Husband—Reduction into Possession—Right to set aside Sale—Decree in former Suit—Bill of Review.*] *W.*, being entitled in right of his wife to a share of certain engravings which were in the hands of *T.* as agent for the parties entitled, sold his wife's share to *T.*, subject to a stipulation that six engravings should be delivered to him in specie. He received the purchase-money, but the six engravings were not delivered. The owners of other shares made similar sales to *T.* *W.* died in the lifetime of his wife. The engravings remained in *T.*'s possession till his death, and were sold in a suit for the administration of his estate. *W.*'s executors after this filed a bill to set aside the sale of Mrs. *W.*'s share as obtained by fraud:—*Held* (affirming the decision of *Malins*, V.C.), that *W.*'s executors, and not the executors of the surviving wife, were the proper persons to sue.—In the administration suit an inquiry was directed what interest *T.* had at his death in the engravings in question, and if interested as owner, to what extent, and whether he became such owner as trustee, legatee, purchaser, or otherwise. In answer to the inquiry it was found that *T.* became entitled as purchaser, subject to the delivery of six of the engravings to each of the vendors, and that such delivery had been made under an order in the suit. *W.*'s executors were parties to these proceedings in respect of their right to the six engravings. An order on further consideration was made treating *T.* as owner, which was afterwards inrolled. The question of fraud had not been raised:—*Held* (affirming the decision of *Malins*, V.C.), that this decree did not interfere with a bill to set aside the sale for fraud. WIDGERY *v.* TEPPER - - - C. A. 423

3. —— *Equitable Estate Tail—Separate Use—Restraint on Anticipation—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 77—*Curtesy.*] A married woman, under the limitations of a will made in 1816, was equitable tenant in tail to her separate use of certain freehold estates. By a clause in the same will she was also restrained from alienation of the rents and profits. Her husband became bankrupt, and after his order of discharge joined with his wife in barring the equitable entail and limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, and the husband's assignees claimed the husband's estate by curtesy:—*Held* (affirming the decision of *Jessel*, M.R.), that the restraint on anticipation did not prevent the wife from barring the entail and acquiring the equitable fee; and that the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate. *Per Jessel*, M.R.:—It is now settled that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy. COOPER *v.* MACDONALD C. A. 288

4. —— *Married Women's Property Act* (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Assurance—Distribution on Death of Husband—Form of Order.*] A husband effected a policy for the benefit of his wife and children under the *Married Women's Property Act*.—The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate. *In re* MELLOR'S POLICY TRUSTS - - 200

5. —— *Separate Estate—Fraud of Married Woman—Restraint on Anticipation—Judgment—Charging Order.*] A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation.—The mortgagee obtained a judgment against her for the amount lent, and a charging order to charge her next accruing dividend:—*Held*, that such charging order must be discharged; for in no case and by no device could the restraint upon anticipation be evaded. STANLEY *v.* STANLEY - - - - 589

6. —— *Separate Estate—Judgment Debt of Married Woman—Debt incurred before Marriage—Restraint on Anticipation—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 12—*Married Women's Property Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *s.* 3—*Costs of Husband's successful Defence added to Debt.*] In an action against a married woman and her husband for a debt contracted by the wife previously to her marriage, judgment was entered against the wife for principal, interest and costs, but in favour of the husband with costs under the provisions of the *Married Women's Property Act*, 1870, and the *Amendment Act*, 1874. The wife's property having been settled on her marriage for her separate use without power of anticipation, the Plaintiffs commenced an action in the Chancery Division, for the purpose of enforcing the judgment obtained by them against the wife, and further, to be allowed to add to this the costs they had had to pay the husband:—*Held*, that, notwithstanding the restraint against anticipation, the Plaintiffs were entitled to recover against the separate estate of the wife the amount of their judgment debt and costs, as well as the costs paid to the husband, which might be added to their original debt. LONDON AND PROVINCIAL BANK *v.* BOGLE 773

—— Action by wife—Next friend - 830
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INDEMNITY—Assignment of lease—Breaches of covenant by assignee - - 398
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INFANT—*Maintenance and Education—Discretion of Trustees—Control of the Court—Past and Future Maintenance.*] A testator gave a legacy of £3000 to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one:—*Held*, that the Court had power to control the discretion of the trustees in the allowance to be made for children; and the Court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance. *In re* HODGES. DAVEY *v.* WARD - 754

2. —— *Power coupled with an Interest—Marriage Settlement—Infant Married Woman—Consent to Investment.*] An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exerciseable during minority.—By a settlement made with the sanction of the Court, upon the marriage of a lady then, and therein described as, "an infant of seventeen years," certain funds belonging to her were vested in trustees upon trust to retain existing investments or reinvest "with the consent" of the lady and her husband during their joint lives; the lady taking the first life interest under the settlement:—*Held*, that the lady had power to consent to a proposed reinvestment, notwithstanding her minority. *In re* CARDROSS'S SETTLEMENT - - - - 728

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INSURANCE — Fire—Landlord and tenant—Option to purchase - - 858
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JUDGE — Absence of — Application to Appeal Judge - - - - 732
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JUDGMENT DEBT — Married woman — Debt before marriage - - - 773
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JURISDICTION—*Obligation—Bond or Mortgage—Charge on Property in Foreign Country—Jurisdiction of Foreign Court.*] A company with an office in *London*, and having house property at *Florence*, raised, under powers in their articles, a sum of money by the issue of "Obligations" payable to bearer, whereby they purported to "bind themselves, their successors and assigns, and all their estate, property, and effects," reserving the right to redeem a certain part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mortgage in the Italian form, registered at *Florence*, the company mortgaged the property to a bank with a *London* office, who had notice of the obligations. The bank having taken proceedings in the tribunal at *Florence* to enforce their mortgage, an action was brought on behalf of the holders of the obligations against the company and the bank, claiming to be mortgagees of the *Florence* property in priority to the bank. On motion to restrain the sale of the property:—*Held*, that the obligations were not mortgages, but simply bonds:—*Held*, also, that even if they created a charge on the company's property, they could not be enforced as against the bank claiming under a registered mortgage at *Florence*; and that, the matter being already before the tribunal of the country where the property was situated, this Court would not interfere. NORTON *v.* FLORENCE LAND AND PUBLIC WORKS COMPANY - - - - 332
—— Chancery Division—District Registry 385
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LAND TAX—*Sale of Lands for Redemption of—Ecclesiastical Corporation—Reservation of Minerals—39 Geo. 3, c. 21, s. 12—57 Geo. 3, c. 100, s. 25.*] The Act 39 Geo. 3, c. 21, which enabled ecclesiastical corporations to sell lands for the redemption of the land tax, provided in sect. 12 that no minerals belonging to any lands sold by such corporation should pass in any conveyance of such lands either by express or general words, but should be always absolutely excepted and reserved as fully as if expressly excepted in the conveyance. The Act 57 Geo. 3, c. 100, contained enactments confirming invalid sales under the first Act.—In the interval between the two Acts a prebendary sold lands, reserving in the conveyance the pipe and potter's clay thereunder to the prebendary for the time being, except within twenty perches from the houses and inclosures forming part of the lands sold:—*Held*, that the subsequent confirming enactments of 57 Geo. 3, c. 100, s. 25, did not so ratify the conveyance as to give validity to the

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LAND TAX—*continued.*
exception from the reservations, but that all the clay under the lands conveyed was reserved to the prebendary and his successors in title, and that they had the powers of working the same incident to the reservation thereof under the first mentioned Act. WHIDBORNE *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND - - 375

LANDLORD AND TENANT—*Confusion of Boundaries—Duty of Tenant—Action to ascertain Boundaries—Jurisdiction—Practice—Reference to Chambers in Lieu of Commission.*] The duty of the tenant of land, immediately adjoining other land of his own, is not merely to leave the boundary between his own land and his landlord's distinct at the expiration of his term, but to keep it distinct during the term.—The Court has, therefore, jurisdiction during the term to ascertain the boundary if the tanant has confused it.—A reference to Chambers to ascertain boundaries directed in lieu of the issue of a commission, further consideration being adjourned and costs reserved. SPIKE *v.* HARDING - - 871

2. —— *Fire Insurance—Option to purchase—Conversion.*] Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase:—*Held*, that, under the circumstances, the tenant had no claim to the insurance money.—The principle of *Lawes* v. *Bennett* (1 Cox, 167) is not to be extended.—*Reynard* v. *Arnold* (Law Rep. 10 Ch. 386) distinguished. EDWARDS *v.* WEST - - 858

3. —— *Specific Performance—Agreement for Lease—"Usual Covenants"—Covenant against Assignment without License.*] Agreement to accept a lease of a dwelling-house in *London* "to contain all usual covenants and provisoes." The lease contained a covenant not to assign without lessor's consent. In an action to compel specific performance of the agreement:—*Held*, that the covenant was not a "usual covenant," and that the agreement could not be enforced.—*Haines* v. *Burnett* (27 Beav. 500) disapproved. HAMPSHIRE *v.* WICKENS - - - - - 555

4. —— *Waste—Reasonable Use of Demised Premises—Covenant by Landlord to keep in Repair—Construction—Implied License to enter—Proviso for Cesser or Abatement of Rent—"Inevitable Accident."*] *Semble*, that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner, having regard to the class of tenement to which they belong, is not waste.—In a lease of a newly constructed grain warehouse there was a covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it, in (as the Court held upon the evidence) a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor

LANDLORD AND TENANT—*continued.*
to recover from the lessee what he had thus expended:—*Held*, that the lessee had not been guilty of waste:—*Held*, also, that the lessor was bound under his covenant to put the walls and main timbers in good repair, having regard to the class of buildings to which the warehouse belonged, and not merely to the condition of the particular building:—*Held*, also, that the covenant implied a license by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs.—The lease contained a proviso that, in case the warehouse, or any part thereof, should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent, or a just proportion thereof, should cease or abate so long as the premises should continue wholly or partly untenantable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use and occupation of the whole or a part of the premises, and he claimed an abatement of rent under the proviso:—*Held*, that the words "inevitable accident," imported something *ejusdem generis* with what had been previously mentioned, and did not apply to that which, though not avoidable so far as the lessee was concerned, was not in its nature inevitable, but resulted from the default of the lessor, and that the lessee was not entitled to an abatement of rent. SANER *v.* BILTON - - 815

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LANDS CLAUSES ACT, 1845, *s.* 69—*Payment out of Court—Trustees with Power of Sale—"Party becoming absolutely entitled."*] Where purchase-money for land has been paid into Court under the *Lands Clauses Act*, it may be ordered to be paid out to trustees of a settlement or will with a power of sale, as persons "becoming absolutely entitled," under the 69th section. *In re* HOBSON'S TRUSTS - - - - - C. A. 708

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LUNATIC — *Insolvency — Contingent Interest — Close of Insolvency—Pro interesse suo.*] In 1854 a person entitled to a contingent future interest in a fund took the benefit of the *Insolvent Act*, but did not mention this interest in his schedule. In 1876 the contingent interest vested in possession. In the same year he was found lunatic, and shortly afterwards an order was made giving the holder of the fund liberty to pay it into Court to the credit of the lunacy, and directing it to be invested and the income paid to the committee. Shortly afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the Chancery Division for its recovery. The Court ordered a transfer of the fund as prayed. *In re* HINDS (A LUNATIC) - - C. A. 26

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METROPOLITAN PAVING ACT (57 *Geo.* 3, *c.* xxix.), *ss.* 84, 89—*Interim Investment of Purchase-money—Petition—Costs.*] The Court has jurisdiction, under sects. 84 and 89 of the *General Metropolitan Paving Act*, to order payment of the costs of an interim investment in consols (including the costs of a petition for the purpose) of purchase-money of land taken by a board of works under the powers of the Act. *In re Saunders' Estate* (Law Rep. 8 Eq. 681) considered. *In re* MERCERON [184

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MISTAKE—*Specific Performance—Compensation.*] The Plaintiff offered to take a lease of a farm belonging to the Defendant at a rent of £500 per annum, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 249 acres. The Defendant's agent desired to let only 214 acres of this farm, but he accepted the Plaintiff's offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the Defendant's agent admitted in examination that he thought the Plaintiff had tendered for the same quantity of land as the former tenant. The Plaintiff commenced an action for specific performance against the Defendant, and was willing to take a lease of the 214 acres at a proportionately reduced rent:—*Held*, that the Defendant must grant the Plaintiff a lease of 214 acres at a rent reduced from £500, in the proportion of 214 to 235. MCKENZIE *v.* HESKETH [675

—— Practice - - - 241, 249, 388
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MORTGAGE—*Costs of Administration—Charge—Salvage Payment.*] A mortgagor who has taken out letters of administration which were necessary to perfect the title to the mortgaged property, is not therefore entitled to be paid out of the mortgaged property the expenses of so doing.—*Shearman* v. *British Empire Assurance Company* (Law Rep. 14 Eq. 4) explained. SAUNDERS *v.* DUNMAN 825

2. —— *Parties — Foreclosure — Action by one alone of several Co-Mortgagees—Action to set aside Deed by Party who did not execute it—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Rules of Court*, 1875, *Order* XVI., *rr.* 2, 13.] As a general rule, one of several co-mortgagees cannot maintain an action to foreclose the mortgage, making the other co-mortgagees Defendants, even though they do not oppose the foreclosure.—*Semble*, that such an action might be maintained if the Plaintiff's co-mortgagees were colluding with the mortgagor, or if it were necessary that the Court should act

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MORTGAGE—*continued.*

in haste to protect the mortgaged property.—A person named (jointly with others) as a party to a deed, but who did not execute it, cannot alone maintain an action to have the deed declared invalid.—If it was intended that the deed should not be binding in equity unless all the joint parties should execute it, those who did execute it are capable of joining in an action to have it declared invalid, and in an action for that purpose they ought to be named as Plaintiffs. LUKE *v.* SOUTH KENSINGTON HOTEL COMPANY - - 789

3. —— *Foreclosure Decree—Order Absolute—Adding Parties after—Opening Foreclosure—Practice—Motion—Service on Party having no Interest—Appearance by Counsel—Costs.*] If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute:—Thus, where, after decree in a foreclosure action the mortgagor's interest had been purchased by *A.*, and the mortgagee's interest by *B.*, and an order was afterwards made for foreclosure absolute on an *ex parte* application by the Plaintiff, the mortgagee, *A.* and *B.* were, on motion by *A.*, ordered to be made co-Defendants, and a subsequent motion by *B.* to discharge that order as irregular on the ground that the action was, in fact, at an end, was refused.—In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the Court, and depends on the circumstances of each particular case.—The general nature of the circumstances under which foreclosure may be opened, considered.—A party who has been served with a notice of motion, but has no interest in the subject-matter, is not entitled to appear by counsel on the motion merely to ask for his costs. Thus, where the Plaintiff in a foreclosure action, who had parted with his interest, had been served with a notice of motion to re-open foreclosure absolute, and appeared by counsel on the motion and asked for his costs, he was held not to be entitled to his costs of appearence; but inasmuch as, upon his being served with the notice of motion, no intimation was given him that he need not appear, and no tender was made to him of his costs of being advised as to the effect of the motion, he was allowed 40*s.* costs. CAMPBELL *v.* HOLYLAND - - - - - - 166

4. —— *Redemption Decree—Mines—Mortgagee in Possession—"Just Allowances"—"Necessary Repairs"—"Permanent Improvements"—Cons. Ord. XXIII., r.* 16.] In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances"; but, to entitle him to "permanent improvements," or "substantial repairs," he must make out a case for them at the trial. TIPTON GREEN COLLIERY COMPANY *v.* TIPTON MOAT COLLIERY COMPANY - - - - - 192

5. —— *Ship—Redemption Decree—"Just Allowances"—Expenses of enforcing Security—Taking and holding Possession, Advertising for Sale, and Insurance—Cons. Ord. XXIII., r.* 16.] The mortgagees of a ship having seized it and advertised it for sale the mortgagors brought an action against them for redemption, and moved for an injunction to restrain the sale, when, upon the Defendants undertaking not to proceed with the sale, a decree was taken, by consent in the action, directing an account of what was due on the mortgage for "principal and interest," and redemption on payment by the mortgagors of the amount certified:—*Held*, upon summons by the Defendants, the mortgagees, that they were justified in seizing the ship, and that, in taking the account directed, they were entitled to be allowed expenses incurred by them in taking and holding possession of the ship, advertising it for sale, and effecting insurances, under the head of "just allowances."—*Horlock* v. *Smith* (1 Coll. 298) considered. WILKES *v.* SAUNION - - - - 188

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See PRACTICE. 42, 43.

NUISANCE—*Unavoidable Nuisance—Gas—Metropolis Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 14—*Gas Works Clauses Consolidation Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 29—*Legal Obligation.*] By an Act of Parliament reciting that under a former Act incorporating the *Gas Works Clauses Act*, 1847, a gas company was under obligation to supply gas the company was authorized to buy certain specified lands adapted for the purpose, the mode of supply was prescribed, and the gas was to be of a certain purity; but by this Act and the *Gas Works Clauses Act*, 1847, it was provided that nothing in those Acts contained should prevent the company from being liable to legal proceedings in consequence of making the gas:—*Held*, that the company was not justified in causing a nuisance even

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NUISANCE—*continued.*
if the gas could not be made of the requisite purity without so doing:—But *held*, on the evidence, that it was not shewn that by greater care and expense the nuisance might not be avoided.—*Quære*, on the construction of the Acts, whether the company was under an obligation to supply gas. ATTORNEY-GENERAL *v.* GASLIGHT AND COKE COMPANY - - - - - 217

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PARTITION—*Action for—Receiver—Judicature Act*, 1873, *s.* 25, *sub-s.* 8—*Partition or Sale—Partition Act*, 1868 (31 *&* 32 *Vict. c.* 40), *s.* 4.] In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the Court has jurisdiction under the *Judicature Act*, 1873, s. 25, sub-s. 8, to appoint a receiver until the hearing.—An estate consisting of a mansion-house and 185 acres belonged to the Plaintiff and the Defendant in equal moieties. It was almost surrounded by a larger estate, of which the Plaintiff was tenant for life, and with which it was formerly united as part of the same family estate. In an action for partition or sale the Plaintiff desired a partition under which the mansion-house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate; he offering to pay what should be necessary for equality of partition. The Defendant, who was also a neighbouring landowner, desired a sale, and had offered, on the writ being issued, to submit to an immediate decree for sale:—*Held*, that, under sect. 4 of the *Partition Act*, 1868, as "no good reason to the contrary" of a sale had been adduced, a sale must be directed. PORTER *v.* LOPES - - - - 358

PARTNERSHIP—*Loan—Participation in Profit and Loss—Partnership Law Amendment Act (Bovill's Act*, 28 *&* 29 *Vict. c.* 86), *s.* 1.] Though an agreement is expressed to be an agreement for a loan to a partnership under sect. 1 of *Bovill's Act*, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the Act and the declaration, is to give him the rights and impose on him the obligations of a partner.—The Act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of the business. *Ex parte* DELHASSE. *In re* MEGEVAND - - - - 511
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POWER—*Appointment—Power coupled with a Trust—Condition Precedent—Impossibility of Condition—Marriage with Consent.*] A testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune on her death to her husband. She married in the testator's lifetime with his consent:—*Held*, that the provision was equivalent to a gift to the husband of the life interest. TWEEDALE *v.* TWEEDALE [833
—— Infant—Power to consent to investment 728
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PRACTICE—*Abatement—Bankruptcy—Cause of Action continuing—Rules of Court*, 1875, *Order L., r.* 1—*Order XVI., rr.* 5, 17—*Form of Judgment—Accruing Damages—Lease.*] Where two of five

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PRACTICE—*continued.*

Defendants, jointly and severally liable to the Plaintiff, had become bankrupt:—*Held*, that the action might proceed against the other three Defendants without bringing the trustees in bankruptcy of the two bankrupt Defendants before the Court, or giving them notice of the proceedings. LLOYD *v.* DIMMACK - - - - 398

2. ——*Abatement—Bankruptcy of Sole Plaintiff—Non-appearance of Plaintiff or of Trustee at Trial—Rules of Court*, 1875, *Order XXXVI., r.* 19; *Order L., r.* 1.] After issue had been joined and notice of trial given by the sole Plaintiff in an action, he filed a liquidation petition, under which a trustee of his property was appointed. When the action came on for trial no one appeared for the Plaintiff or for the trustee, and there was no evidence that any notice of the action had been served on the trustee:—*Held*, that rule 1 of Order L. of Rules of Court, 1875, applies only when the cause of action survives or continues in some person who is before the Court; that the action had abated, and that the only order which could be made was to strike the action out of the list. ELDRIDGE *v.* BURGESS - - - 411

3. —— *Alternative Relief—Hearing—Several Defendants—Costs—Rules of Court*, 1875, *Order XVII., rr.* 1, 8.] The Plaintiff, lessee of land, brought an action against the lessor and against other lessees, who claimed a right of way over the Plaintiff's land, denying the right, and claiming an injunction against them; or, if the Court should hold that they had under their lease a right of way, then damages from the lessor:—*Held*, that the Plaintiff was not at the hearing bound to elect against which of the Defendants to proceed, but that the counsel of the lessor might support the case of the Plaintiff against the other lessees.—Judgment having been given for the other lessees, establishing their right of way, and the Plaintiff's right to indemnity from the lessor being then admitted:—*Held*, that nevertheless the lessor would not be ordered to pay to the Plaintiff the costs incurred by making the other lessees Defendants. CHILD *v.* STENNING [413

4. —— *Alternative Relief—Inconsistent Allegations—Rules of Court*, 1875, *Order XVII., rr.* 1, 8; *Order XXVII., r.* 1; *Order XXXVI., r.* 6.] A Plaintiff, by his statement of claim, claimed to have an agreement for a partnership with the Defendant in a land speculation cancelled on the ground that he had been induced to enter into it by the misrepresentation of the Defendant, and in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement might be dissolved and the accounts taken, and the Defendant restrained from interfering with the management of the works in violation of the agreement.—The Defendant moved for an order for the Plaintiff to amend his statement of claim by confining it to one of the alternative claims:—*Held* (reversing the decision of *Bacon*, V.C.), that there was no inconsistency in the alternative claims, or in the allegations in support of them; and the motion was refused. BAGOT *v.* EASTON - - - - - C. A. 1

5. —— *Amendment of Pleadings—Statement of Defence—Amended Statement of Claim—Pleading last delivered—Course open to Defendant.*] Where a Plaintiff has amended his statement of claim after delivery of statement of defence, and, no other pleading having been delivered, moves for judgment on amended statement of claim, the Defendant may either obtain leave to amend his defence, or put in a new defence, or he may proceed with his original defence, in which case the amendments in the amended statement of claim will be taken to be admitted and the statement of defence will stand as an answer *pro tanto*.—*Durling* v. *Lawrence* (Weekly Notes, 1877, p. 182) not followed. BODDY *v.* WALL - - 164

6. —— *Appeal — Bankruptcy — Non-appearance of Appellant—Proof by Respondent of Service of Notice of Appeal.*] When a bankruptcy appeal has been set down in the ordinary course and is in the day's paper for hearing, if the Appellant does not appear the Respondent is entitled to have the appeal dismissed with costs without giving any proof that he has been served with a notice of appeal. *Ex parte* Lows. *In re* Lows [C. A. 160

7. —— *Appeal — Bankruptcy — Time within which Appeal Notice must be sent to the Registrar of the Court appealed from—"Forthwith"—Bankruptcy Act*, 1869, *s.* 71—*Bankruptcy Rules*, 1870, *rr.* 143, 144.] Rule 144 of the Bankruptcy Rules, 1870, requires that upon entering an appeal a copy of the appeal notice shall be sent "forthwith" to the Registrar of the Court appealed from:—*Held*, that "forthwith" must be read with reference to the period of twenty-one days within which, by rule 143, a notice of appeal must be entered with the Registrar of Appeals, and that it means within twenty-one days from the date of the order appealed from, or as soon as possible afterwards.—Where the order appealed from was made on the 22nd of August, and notice of appeal was duly left and entered with the Registrar of Appeals and a deposit paid, but a copy of the appeal notice was not served on the Registrar of the Court appealed from until the 12th of November:—*Held*, that the appeal was out of time and irregular, and that it could not be heard. *In re* SILLENCE. *Ex parte* SILLENCE [C. A. 238

8. —— *Appeal for Costs—Interlocutory Injunction—Undertaking as to Damages.*] *C.* having, through *D.*, his agent, agreed to sell a property to *F.*, *G.*, alleging a prior contract for sale to himself, commenced an action against *C.*, *D.*, and *F.* for specific performance, and, in default, for damages against *C.* and *D.*, and obtained an interlocutory injunction restraining *C.* and *F.* from completing the sale, *G.* giving the usual undertaking as to damages, *Malins*, V.C., *held* that no contract had been entered into with *G.*, and dismissed the claim with costs as against *F.*, but as against *C.* and *D.* without costs, considering the conduct of *D.* blameable, and refused to give any inquiry as to damages. *C.* and *D.* appealed, on the ground that the dismissal ought to have been with costs, and that an inquiry as to damages ought to have been granted. *G.* presented a cross appeal asking for damages against *C.* and *D.* The Court of Appeal (*James*, *Cotton*, and *Thesiger*, L.JJ.) agreed with the Vice-Chancellor that there was

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PRACTICE—*continued.*

no contract between *C.* and *G.*, but did not agree with him in his unfavourable view of *D.'s* conduct:—*Held*, that *C.* was entitled to damages under the undertaking, for that, unless under special circumstances, effect ought to be given to such an undertaking when an injunction turns out to have been wrongly granted, but that in the present case, as the only possible damage was that *C.* had been delayed in receiving the purchase-money, an inquiry would not be directed, but *C.* should receive from the Plaintiffs interest at £5 per cent. on the purchase-money, minus any interest actually made by him, the amount to be verified by affidavit:—*Held*, that *C.* and *D.* were entitled to the costs of both appeals, but that although *C.'s* appeal was not for costs alone, and by reason of that fact and of the cross appeal the whole case had been heard, the Court was not at liberty to vary the order of the Court below as to costs:—*Held*, also, that where a Defendant has had notice of motion for an injunction, it is improper to grant an injunction against him *ex parte*, though the pressure of business may be such as to prevent the motion on notice from being brought on.—An interlocutory injunction ought to be made upon an undertaking for damages. GRAHAM *v.* CAMPBELL - - - - **C. A. 490**

9. —— *Appeal from Order in Chambers—Security for Costs—Amendment making new Case—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.] An action was commenced by a limited company which was in course of liquidation. The Defendants put in a defence, counter-claim, and demurrer, and subsequently obtained an order for inquiries. After this, and about ten months after the original statement of claim had been delivered, the Plaintiffs obtained an order to amend, and made amendments raising a fresh case likely to require a great mass of additional evidence. The Defendants thereupon applied to have security for costs, which was refused by *Malins*, V.C., in Chambers, but no certificate that he did not desire the case to be further argued was applied for:—*Held*, that on a point of this kind an appeal direct from Chambers ought to be allowed:—*Held*, also, that as a new case which would cause a great increase of expense had been raised by the amendment, security for costs ought to be given. NORTHAMPTON COAL, IRON, AND WAGGON COMPANY *v.* MIDLAND WAGGON COMPANY **C. A. 500**

10. —— *Appeal—Time for appealing—Refusal of Application—Several Claims joined in one Application—Rules of Court*, 1875, *Order LVIII., r.* 15.] Where several distinct claims are joined in one application, and an order is made allowing some of them and making no mention of the others, an appeal asking that all the claims should be allowed must be brought within twenty-one days from the hearing of the application. BERDAN *v.* BIRMINGHAM SMALL ARMS AND METAL COMPANY **[C. A. 24**

11. —— *Appeal—Time for appealing—Application for Extension of Time—Rules of Court*, 1875, *Order LVIII., r.* 15.] A decree was made dismissing the Plaintiff's suit. The judgment was based in great measure on the interpretation of a particular statute. Fourteen months afterwards a judgment was pronounced by the Court of Appeal in another case in which a different construction was put upon the statute. Six months afterwards, being a year and eight months after the decree in the first mentioned suit, the Plaintiff in that suit applied for leave to appeal, although the time limited for appeal by Rules of Court, 1875, Order LVIII., rule 15, had expired:—*Held*, that, independently of the delay on the part of the Plaintiff after knowledge of all the circumstances, the mere fact that the Court of Appeal had come to a different opinion on a doubtful point of law, was not sufficient reason for enlarging the time for appealing, and the application was refused.—The Court will not grant an extension of the time for appealing after the time limited by the rules has elapsed, except under very special circumstances. CRAIG *v.* PHILLIPS - - **C. A. 249**

12. —— *Appeal—Time for appealing—Refusal of Application—Dismissal of Suit at the Hearing—Suit heard under old Practice—Rules of Court*, 1875, *Order LVIII., r.* 15—*Judicature Act*, 1873, *s.* 22—*Enlargement of Time—Bonâ fide Mistake—Order LVII., r.* 6.] The time for appealing from the dismissal of a suit at the hearing dates from the time of pronouncing the judgment; the word "application" in Order LVIII., rule 15, being applicable to the hearing of a suit as well as to an interlocutory proceeding.—Where a suit in Chancery was brought to an issue on replication filed and heard under the old practice, it was *held* that the appeal must be regulated by the new practice, and the bill having been dismissed, the time for appealing was calculated from the pronouncing of the decree.—The mere fact that an Appellant has misconstrued one of the rules, and by reason of such mistake has omitted to bring his appeal in time, is not a sufficient ground for enlarging the time for appeal. INTERNATIONAL FINANCIAL SOCIETY *v.* CITY OF MOSCOW GAS COMPANY. CITY OF MOSCOW GAS COMPANY *v.* INTERNATIONAL FINANCIAL SOCIETY - **C. A. 241**

13. —— *Appeal—Time for appealing—Order on Interpleader Issue—Rules of Court*, 1875, *Order LVIII., r.* 15.] Two actions having been brought relating to a cargo, an interpleader issue was directed to try the question to whom it belonged. It was tried by the Master of the Rolls, who made an order finding in favour of the Defendants, and declaring them to be entitled to the cargo. Subsequently an order was made in the actions directing the proceeds of the cargo, which were in Court, to be paid to the Defendants:—*Held*, that the former order was an interlocutory order, from which an appeal could not be brought after twenty-one days.—Leave to appeal notwithstanding the lapse of time, refused; the Respondents not having done anything to raise an equity against them. MCANDREW *v.* BARKER **C. A. 701**

14. —— *Appeal—Time for setting down Appeal—Rules of Court*, 1875, *Order LVIII., r.* 8.] Notice of appeal from an interlocutory order made on the 24th of January was given on the 13th of February for the 18th of February, but owing to a mistake of the solicitor's clerk was not set down till the 19th. The appeal came on to be heard on the 20th:—*Held*, that, not having been set down till after the day for which notice was given, it must be dismissed:—*Held*, also, that leave to

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PRACTICE—*continued.*

appeal notwithstanding the lapse of time ought not to be given, there having been no conduct on the part of the Respondent to raise an equity against him. *In re* MANSEL. RHODES *v.* JENKINS [C. A. 711

15. —— *Confession—Rules of Court*, 1875, *Order* XX., *r.* 3—*Signing Judgment for Costs.*] Where a Defendant is adjudicated bankrupt after action brought, upon an act of bankruptcy which occurred before action brought, the Plaintiff may confess that the property claimed was in the order and disposition of the Defendant at the date of the act of bankruptcy, and sign judgment under Rules of Court, 1875, Order XX., r. 3, for his costs. CHAMPION *v.* FORMBY - - - 373

16. —— *Consent Judgment—Mistake—Time.*] After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. ATTORNEY-GENERAL *v.* TOMLINE - - - - - 388

17. —— *Costs — Administration Action — Equity of Redemption — Taxation — Higher or Lower Scale—Additional Rules of Court, August*, 1875, *Order* VI., *r.* 1.] In administration actions, where the gross value of the estate to be administered amounts to £1000 at the time of the institution of the action, the higher scale of costs applies: and in estimating such value where the estate to be administered comprises an equity of redemption, the value of the equity of redemption only, and not of the entire mortgaged estate, is to be regarded. If, however, in such a case the equity of redemption has been valued at the time of the institution of the action at such a sum as, with the rest of the estate to be administered, amounts to £1000 or upwards, but it afterwards turns out, on a sale by the mortgagees, that the proceeds of such sale, together with the rest of the estate to be administered, amount to less than £1000, the lower scale applies.—*In re Reece's Estate* (Law Rep. 2 Eq. 609) explained. *In re* SANDERSON - - - - - 176

18. —— *Costs of Abandoned Appeal Motion.*] An Appellant's solicitors wrote to the solicitors of the Respondent withdrawing their notice of appeal as irregular. The Respondent, who had delivered briefs to oppose the appeal, applied *ex parte* to discharge the notice of appeal with costs:—*Held*, that notice of motion must be given. *In re* OAKWELL COLLIERIES - - C. A. 706

19. —— *Costs—Higher or Lower Scale—Election—Action by disappointed Legatee for Damages or Compensation — Equitable Fraud — Common Law Action in Chancery Division—Causes and Matters assigned to Chancery Division—Additional Rules of Court, August*, 1875, *Order* VI., *r.* 1 —*Judicature Act*, 1873, *s.* 34.] A testator purported to devise six freehold cottages to his wife for life, with remainder to his nephew in fee, and bequeathed his personal estate—which amounted to upwards of £1000—to his wife absolutely. The cottages were not in fact the property of the testator, but of his wife. After the testator's death his widow sold the cottages to a purchaser in fee. Upon the death of the widow a purchaser of the nephew's supposed reversion under the will

PRACTICE—*continued.*

brought an action against her executors, claiming damages in consequence of her alleged wrongful sale, or compensation in consequence of her having elected to take the cottages against her husband's will, and, if necessary, administration of the estates of herself and her husband. At the trial of the action it was declared that the Plaintiff was entitled to prove against the widow's estate (which was already being administered in another action) for the value of the cottages—subsequently assessed at £360—and for his costs in the action. In taxing the costs the Taxing Master taxed them on the lower scale under Additional Rules of Court, August, 1875, Order VI., r. 1, on the ground that the value of "the estate or fund dealt with" in the action was under £1000:—*Held*, on a summons to review the taxation, that the action was nothing more than an action for damages, and not within the causes and matters assigned to the Chancery Division by the *Judicature Act*, 1873, s. 34, and that consequently the lower scale applied. ROGERS *v.* JONES - - - 345

20. —— *Counter-claim — Pleading—Set-off—Specific Statement of Facts relied on—Rules of Court*, 1875, *Order* XIX., *rr.* 3, 4, 10—*Writ of Ne Exeat—Damages for improper Issue.*] A writ of *ne exeat* against a Defendant was obtained by the Plaintiff immediately after the commencement of an action. The Defendant was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence the Defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim:—*Held*, that, as the Defendant had not moved to discharge the writ, it must be taken to have been properly issued, and, consequently, that the Defendant was not entitled to any damages.—The Defendant made the allegation that the writ had been improperly issued, and the claim for damages, in one paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-claim:—*Held*, that the pleading was good as a counter-claim.—*Crowe* v. *Barnicot* (6 Ch. D. 753) distinguished. LEES *v.* PATTERSON - - - - - 866

21. —— *Defence—Admissions—Evasive Denial—Pleading—Judgment—Leave to amend—Rules of Court*, 1875, *Order* XIX., *rr.*, 17, 22; *Order* XL., *r.* 11.] In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given:—*Held*, that the giving the bribe was not sufficiently denied under Rules of Court, 1875, Order XIX., rule 22, and must, under Order XIX., rule 17, be taken to have been admitted; judgment for the Plaintiffs given; leave to amend the statement of defence being refused:—*Held*, also, that the Plaintiffs had not waived their right to judgment on the admissions by not having moved for judgment under Order XL., rule 11. TILDESLEY *v.* HARPER - - - - 403

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PRACTICE—*continued.*

22. —— *Defence — Pleading — Admission — Rules of Court*, 1875, *Order XIX., rr.* 17, 20; *Order XXXVI., r.* 18—*Notice of Trial—Action in Chancery Division—Order XXXVI., r.* 8—*Appendix B., Form No.* 14.] A Defendant, by his statement of defence, simply "put the Plaintiffs to proof of the several allegations in their statement of claim." He did not appear at the trial, but service of a notice of trial upon him was proved:—*Held*, that the Defendant had admitted the facts alleged in the statement of claim, and that the Plaintiffs were entitled to judgment, without adducing any evidence in support of their case.—In an action in the Chancery Division marked with the name of Vice-Chancellor *Hall*, the Plaintiffs served notice of trial "by a Judge in *Middlesex*":—*Held*, that that this was a sufficient notice. HARRIS *v.* GAMBLE - - - - - 877

22a. —— *Defence—Pleading—Admission of non-existing Right—Order XL., r.* 11.] A Plaintiff moving for judgment under Rules of Court, 1875, Order XL., r. 11, on admissions in the Defendant's pleadings, must have a clear case, and the mere admission or non-denial by the Defendant of a right asserted by the Plaintiff, but which has in fact no existence in law, is not sufficient to entitle the Plaintiff to a judgment establishing the right. CHILTON *v.* CORPORATION OF LONDON - - 735

23. —— *Defence—Pleading—General Denial —Rules of Court*, 1875, *Order XIX., rr.* 17, 20, 23.] The statement of claim in an action for specific performance stated that the predecessor in title of the Plaintiff, by his agent lawfully authorized, signed an agreement with *H.*, the predecessor in title of the Defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that *H.*, the predecessor in title of the Defendant, was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by *H.* or any person by him lawfully authorized:—*Held* (affirming the decision of *Fry*, J.), that, under the statement of defence, the Defendant could only enter into evidence to shew the unsoundness of mind of *H.*, and could not enter into evidence to shew that the agent was not duly authorized. BYRD *v.* NUNN C. A. 284

24. —— *Defence—Pleading—General Denial followed by Particular Denial—Amendment at Trial—Rules of Court*, 1875, *Order XIX., rr.* 17, 18, 20, 22; *Order XXVII., rr.* 1, 6—*Copyright—Registration*—5 & 6 *Vict. c.* 45, *ss.* 13, 24.] In an action for damages for an alleged infringement of the Plaintiff's copyright in a song, the Defendant, by his statement of defence, alleged that the song had not been registered at *Stationers' Hall* until the 9th of December, 1876, and added, "the Defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register:"—*Held*, that on this pleading the Defendant was only entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated.—*Held*, also, that leave to amend the statement of defence, so as to raise the latter point, ought not to be given, even though by the Plaintiff's own evidence at the trial it for the first time appeared that the name of the publisher had been untruly entered in the register. COLLETTE *v.* GOODE - - 842

25. —— *Discontinuance of Action — Undertaking as to Damages—Rules of Court*, 1875, *Order XXIII.*] A Plaintiff who had given an undertaking as to damages discontinued his action:—*Held*, that the Court would nevertheless direct a reference as to damages. NEWCOMEN *v.* COULSON 764

26. —— *Discontinuance — Test Action — Refusal of Plaintiff to proceed with Trial—Rules of Court*, 1875, *Order XXIII.; Order XXXVI., r.* 19.] When an action, which had been made a test action (for the purpose of deciding the rights of the Plaintiffs in a number of similar actions against the same Defendants), came on for trial, the Plaintiff declined to proceed, on the ground that he was not in a fit state of health to attend and be examined as a witness. On a previous occasion he had moved for and obtained a postponement of the trial, on the ground of his ill-health. A week before the trial an application by the Plaintiff in Chambers to stay all proceedings in the action had been refused by *Malins*, V.C., on the ground that the Plaintiff was not *dominus litis*, but a trustee for the Plaintiffs in the other actions. At the trial the Plaintiff asked for a postponement, or that an order of discontinuance might be made under Rules of Court, 1875, Order XXIII.:—*Held*, that the Court could not regard the rights of the Plaintiffs in the other actions, but must act as if the Plaintiff had not appeared at the trial, and must dismiss the action with costs. ROBINSON *v.* CHADWICK - - - - - 878

27. —— *Discovery—Interrogatories—Particulars of Demand—Accounts—Rules of Court*, 1875, *Order XXXI., rr.* 5, 8, 19.] The Defendant employed the Plaintiff as manager of his business under a written agreement at a salary and a commission on the gross amount of sales. Disputes having arisen, the Defendant summarily dismissed the Plaintiff. The Plaintiff commenced an action for wrongful dismissal. The Defendant by his defence alleged specific acts of misconduct against the Plaintiff, and also alleged in general terms other acts of misconduct justifying the dismissal. The Plaintiff exhibited four interrogatories, of which the substance was to ask the Defendant to specify the acts of misconduct on which he relied, and a fifth interrogatory asking for the total amount of the gross proceeds of sales during the period for which the Plaintiff claimed remuneration. The Defendant refused to answer the first four interrogatories, on the ground that they related to the case of the Defendant, not of the Plaintiff, and the fifth interrogatory, on the ground that, as the right to an account of commission was disputed, the Defendant was not bound to give such account at that stage of the action:—*Held*, by *Bacon*, V.C., and by the Court of Appeal, that the interrogatories must be answered.—*Per Baggallay*, L.J.: Whether a party can, under Order XXXI., rule 8, object by affidavit to answer an interrogatory on any ground for which it might have been struck out under rule 5, *quære*. SAUNDERS *v.* JONES - - - C. A. 435

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PRACTICE—*continued.*

28. —— *District Registry—Trial at Liverpool—Petition for Charging Order—Solicitors Act* (23 & 24 *Vict. c.* 127), *s.* 28—*Jurisdiction.*] In an action intituled in the Chancery Division, *Liverpool* District Registry, and tried before a Judge and jury at *Liverpool*, a petition under the statute 23 & 24 Vict. c. 127, s. 28, by a solicitor for an order to charge the property recovered or preserved must be presented to the Judge who tried the action, the Judge of the Chancery Division, to whose Court the action was attached, having no jurisdiction to hear the petition. OWEN *v.* HENSHAW - - - - - - - 385

29. —— *Evidence by Affidavit—Rules of Court,* 1875, *Order XXXVII., r.* 1.] Where one party desires the production of a witness for cross-examination, the Court has no power to order an affidavit used on a previous application to be read at the trial. BLACKBURN UNION *v.* BROOKS - 68

30. —— *Evidence—Affidavits in reply—Rules of Court,* 1875, *Order XXXVIII., rr.* 1, 3.] Where evidence is taken by affidavit under Rules of Court, 1875, Order XXXVIII., r. 1, the Plaintiff's affidavits in reply need not be restricted to cutting down the Defendant's evidence, but may be confirmatory of the Plaintiff's evidence in chief, and the practice to this effect in the Chancery Division has not been altered by rule 3 of the same Order. PEACOCK *v.* HARPER - - - - - 648

31. —— *Evidence — Affidavit sworn before Plaintiff's Local Solicitor.*] In an action in the Chancery Division, the Plaintiff's *London* solicitors, who were his only solicitors on the record, employed a firm who were his country solicitors in getting up evidence. This business was done entirely by one of the partners in the country firm, but some of the affidavits filed on behalf of the Plaintiff were sworn before the other partner: —*Held*, that such affidavits were inadmissible. DUKE OF NORTHUMBERLAND *v.* TODD - 777

32. —— *Evidence—Commission to take Evidence abroad—Discretion of Judge—Delay—Rules of Court,* 1875, *Order XXXVII., r.* 1.] Issue was joined in an action on the 11th of June, and the same day it was set down for trial. On the 13th of November it was in the paper for trial, but on the Plaintiff's application, with the consent of the Defendants, the trial was postponed for a month. On the 13th of December the Plaintiff gave notice of motion for the appointment of a commission to take the evidence of himself and another witness, who were in *India*, and that the trial might be postponed until the return of the commission. At the hearing of the motion on the 17th of December the Defendants offered to consent to a postponement of the trial for two months, but this offer was declined:—*Held*, that the Plaintiff was too late in making the application, and that as he had refused the Defendants' offer, the motion must be refused with costs. STEUART *v.* GLADSTONE - - - - - - - 394

33. —— *Foreclosure absolute—Power of Attorney.*] Under a decree for foreclosure an agent of the mortgagees attended at the place appointed for payment of the money, and during the whole of the appointed time, but without any power of attorney to receive the money. No one appeared on behalf of the mortgagors:—*Held*, that the

PRACTICE—*continued.*

foreclosure ought to be made absolute. COX *v.* WATSON - - - - - - 196

34. —— *Injunction till further Order.*] Where an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period except with the leave of the Court. BOLTON *v.* LONDON SCHOOL BOARD - - - - 766

35. —— *Lis pendens—Motion to vacate Registration—30 & 31 Vict. c.* 47, *s.* 2.] Where an action which was registered as a *lis pendens* had been dismissed for want of prosecution, the Court, on a motion made *ex parte* on behalf of the Defendant, under 30 & 31 Vict. c. 47, s. 2, to vacate the registration, made an order *nisi*, the Plaintiffs to shew cause within one week why the order should not be made absolute. POOLEY *v.* BOSANQUET [541

36. —— *Lis pendens—Action to vacate Registration—30 & 31 Vict. c.* 47, *s.* 2.] A foreclosure suit, which had been registered as a *lis pendens*, was dismissed at the hearing, and the Plaintiff appealed. Before the appeal was set down the Defendant brought an action claiming that the registration of the *lis pendens* might be vacated: —*Held*, that the proper course would have been to bring a motion in the matter of the 30 & 31 Vict. c. 47, and in the matter of the suit. But the Court ordered the action to stand over to await the result of the appeal. CLUTTON *v.* LEE 541, n.

37. —— *Misjoinder of Parties—Husband and Wife—Action for Separate Estate—Costs—Rules of Court,* 1875, *Order XVI., rr.* 1, 2, 13.] Since the Judicature Acts, as before, a married woman suing to recover separate estate ought to sue by a next friend, making her husband a Defendant.—In an action of this kind the husband was made a co-Plaintiff. The Defendant by his statement of defence objected that the husband ought to have been a Defendant. The statement of claim was afterwards amended for another purpose, but no alteration was made as to the parties.—At the trial the Court ordered the husband to be made a Defendant, and, in giving judgment for the wife, deprived her of the costs of the pleadings subsequent to the time when the Defendant took the objection. ROBERTS *v.* EVANS - - 830

38. —— *Prolixity of Pleading—Rules of Court,* 1875, *Order XXVII., r.* 1; *Order XIX., rr.* 2, 4, 24, 25, 27—*Pleading calculated to embarrass opposite Party—Pleading Evidence—Allegation of Fraud.*] Although the Court of Appeal will not readily interfere with the discretion of the Court of first instance in a matter of procedure, it is its duty to exercise its own discretion as to whether a pleading is so framed as to embarrass the opposite party. In a case, therefore, where a statement of claim was in the opinion of the Court of Appeal calculated to embarrass the Defendants by reason of its stating immaterial facts, and setting out at great length documents which could not be material except as evidence by way of admission, it was ordered to be struck out, though a motion for that purpose had been dismissed with costs by the Court below.—The rule that evidence is not to be pleaded applies to admissions as well as to other evidence. DAVY *v.* GARRETT - C. A. 473

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PRACTICE—*continued.*

39. —— *Receiver—Disobeying Four-day Order—Sequestration—Application for Leave to issue, unnecessary—Rules of Court*, 1875, *Order* XLII., *rr.* 2, 20; *Order* XLVII.] Under Rules of Court, 1875, Order XLII., rules 2 and 20, and Order XLVII., a writ of sequestration against the estate and effects of a receiver or other person for disobedience of an order of the Court may be issued without the leave of the Court. SPRUNT *v.* PUGH [567

40. —— *Staying Proceedings—Action for Dissolution of Partnership—Agreement of Compromise—Repudiation by Plaintiff—Summons by Defendant to stay further Proceedings in the Action—Judicature Act*, 1873, *s.* 24, *sub-ss.* 5, 7—*Jurisdiction—Costs of one Counsel for each of two Defendants, Co-partners.*] A partnership having, in an action brought by the Plaintiff, been by order of the Court dissolved, the Plaintiff and Defendants signed an agreement of compromise, whereby it was agreed that the Plaintiff should be paid a sum of money for his share in the business.—The Plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud:—*Held*, on summons taken out by one of the Defendants, and supported by the co-Defendant, that the Court had, under the *Judicature Act*, 1873, s. 24, sub-ss. 5, 7, jurisdiction to order the stay of all further proceedings in the action:—*Held*, also, that as the Defendants had severed upon the summons, and been represented by four counsel, the costs to be paid by the Plaintiff would be for one counsel only for each Defendant. EDEN *v.* NAISH - - - 781

41. —— *Trial—Chancery Division—Changing Place of Trial—Trial of Issue of Fact before Judge at Assizes without Jury—Delay—Rules of Court*, 1875, *Order* XXXVI., *rr.* 5, 29—*Jurisdiction of Judge after Transfer of Action—Order* LI., *r.* 1*a* (19 *June*, 1877).] The power given to the Court or a Judge by Rules of Court, 1875, Order XXXVI., r. 29, is a discretionary one, and an order will not be made under it on the application of a Plaintiff who has unduly delayed the giving of his notice of trial, or the taking of other steps in the action:—*Semble*, that after an action in the Chancery Division has been transferred for the purpose of trial or hearing to another Judge of the same Division, the Judge to whom the action was originally attached has no jurisdiction to order that an interlocutory application in the action shall be heard by the Judge to whom the transfer has been made:—*Semble*, that, under Order LI., rule 1*a*, such an order can only be made by the latter Judge. LLOYD *v.* JONES - - - 390

42. —— *Trial—Non-appearance of Plaintiff—Proof by Defendant of Service of Notice of Trial—Rules of Court*, 1875, *Order* XXXVI., *rr.* 10, 19, 20—*Setting aside Judgment—Costs.*] Where an action is called on for trial and the Plaintiff does not appear, the Defendant is not entitled to judgment unless he proves that notice of trial has been served upon him.—When the judgment so obtained is set aside, it will be on payment by the Plaintiff of the costs of the day and of the application. COCKLE *v.* JOYCE - - - 56

43. —— *Trial—Non-appearance of Plaintiff—Proof by Defendant of Service of Notice of Trial—Rules of Court*, 1875, *Order* XXXVI., *rr.* 10, 19.] When an action is called on for trial and the Plaintiff does not appear, the Defendant appearing is entitled to have judgment in his favour with costs, without proving that he has been served with notice of trial.—*Robson* v. *Robson* (22 Sol. J. 70) and *Ex parte Lowe* (7 Ch. D. 160) followed. *Cockle* v. *Joyce* (7 Ch. D. 56) not followed. JAMES *v.* CROW - - - - - 410

44. —— *Vacation—Absence or Vacancy in Office of Judge—Judge rising for Short Vacation—Application to Appeal Judge—Injunction—Transfer of Action—Judicature Act*, 1873, *s.* 51—*Rules of Court*, 1875, *Order* LI., *r.* 2.] Order LI., rule 2 (Rules of Court, 1875), has reference only to the transfer of an action from one Division to another, and does not authorize a transfer from a Judge of one Division to another Judge of the same Division.—Whenever during the regular sittings of the High Court of Justice any Judge of the High Court is absent from any cause, as for instance, through having risen for a few days' vacation, applications of an urgent nature in any action pending before such Judge will be heard and disposed of by the Master of the Rolls or any other Judge of the Court of Appeal, under sect. 51 of the *Judicature Act*, 1873, upon a request being obtained from the Lord Chancellor. CHAPMAN *v.* REAL PROPERTY TRUST, LIMITED - - 732

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PRINCIPAL AND AGENT—*Acceptance—Repudiation—Concluded Agreement—Payment into Court—Costs.*] The Plaintiffs claimed £37 from the Defendant for the use and occupation of a house, and authorized him to pay the amount to a person whom they named. She called on the Defendant, and he then expressed his readiness to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender was made. The Plaintiffs sued the Defendant for the use and occupation, claiming £238. The Defendant paid £37 into Court:—*Held*, that as soon as the Defendant expressed to the agent his readiness to pay the £37 there was a concluded agreement between him and the Plaintiffs for that amount, and that the Plaintiffs could not recover more:—*Held*, also, that the Defendant was entitled to the costs of the action from the time of the payment into Court. GRETTON *v.* MEES - - - - - - 839

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SETTLEMENT—*Rectification—Improper Limitations—Husband acting as Wife's Agent—Costs against a Solicitor.*] The Plaintiff, a widow with children, being possessed of property left by her first husband, married, and marriage articles were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband and the solicitor who prepared the settlement:—*Held*, by the Vice-Chancellor, that upon the evidence, the limitations were contrary to the intention of the Plaintiff, and that the husband, having undertaken as agent for the wife to have a settlement prepared, was bound to have such a contract prepared as the Court would sanction, and such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement.—The husband, and the solicitor who prepared the settlement (who in the view of the Vice-Chancellor had failed in his professional duty, and had by his neglect and misconduct caused the litigation), were ordered to pay the costs of the suit:—*Held*, on appeal by the solicitor, that as he had not been guilty of participation in a fraud, but at most only of a blunder for which the remedy was an action for professional negligence, there was no jurisdiction to order him to pay the costs of the suit. CLARK *v.* GIRDWOOD - - **C. A. 9**
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SOLICITOR—*Lien for Costs—Charging Order—23 & 24 Vict. c. 127, s. 28.*] By an order made in an administration suit, the costs were ordered to be taxed, and the Plaintiff's costs to be paid to his solicitor, *B.*, out of a specified fund in Court. Before the costs had been taxed the Plaintiff obtained an order to change his solicitor, and *B.* no longer acted for any party in the suit:—*Held*, that *B.* was entitled to a charging order, under 23 & 24 Vict. c. 127, upon the interest of his client in the funds in Court, notwithstanding the prior order for payment out of a certain specified fund; but that such order ought not to extend to directing a sale, but must be limited to giving the parties liberty to apply. The fact that the Plaintiff had in the meantime assigned his interest with the knowledge of *B.* made no difference—The order of *Bacon*, V.C., varied.—*Held*, also, by *Bacon*, V.C., that *B.* had a right to retain the papers in the suit till his costs were paid. PILCHER *v.* ARDEN. *In re* BROOK - - **C. A. 318**

2. —— *Lien for Costs—Charging Order—Mortgage by Clients—Priority—Solicitors Act (23 & 24 Vict. c. 127), s. 28.*] The Plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the Defendants. This mortgage was sent to the solicitor of the Plaintiffs for his perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the Plaintiff's solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under 23 & 24 Vict. c. 127, s. 28, on the interests of the Plaintiffs:—*Held*, by the Master of the Rolls, that the charge ought to be postponed to the mortgage to the Defendants.—*Held*, on appeal, that as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the Plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment. FAITHFULL *v.* EWEN **C. A. 495**

3. —— *Settled Account—Costs—Taxation—After Payment—Solicitors Act (6 & 7 Vict. c. 73), s. 41—Special Circumstances—Overcharges.*] An

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SOLICITOR—*continued.*

account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the ground, 1, of undue influence, 2, that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. WATSON *v.* RODWELL - - - - - - 625

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SPECIALTY CREDITOR—*Company—Deed securing Advances—Recital acknowledging Debt.*] A deed dated in 1860 between a company, *J.* a director, and certain trustees, recited the acquisition of certain collieries by *J.* on behalf of the company, that the outlay had been provided as to £467,079 out of the company's money, and as to £43,216 by *J.* for the benefit of the company, and thereby *J.*, in consideration of the repayment of the £43,216 being secured in manner appearing, conveyed the collieries to the trustees upon trusts to secure, first, the £467,079, and secondly, the £43,216 "so due to *J.*" The holding of collieries being *ultrà vires* the company, and an Act of Parliament having directed the sale of the collieries, the property was sold and did not realize sufficient to pay the £467,079:—*Held*, that the deed of 1860 did not constitute *J.* a specialty creditor of the company, but only operated to give him a charge upon the property comprised in the deed. JACKSON *v.* NORTH EASTERN RAILWAY COMPANY - - - - - - 573

SPECIFIC LEGACY—Ademption - - 339
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4 & 5 Will. 4, c. 40, s. 12—*Friendly Society*
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6 & 7 Vict. c. 73, s. 41—*Solicitors* - 625
See SOLICITOR. 3.

7 Vict. c. 12, s. 6—*Copyright* - - 301
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8 Vict. c. 18, s. 69—*Lands Clauses Act* - 708
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10 & 11 Vict. c. 15, s. 29—*Gasworks Clauses*
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10 & 11 Vict. c. 96—*Trustee Relief Act* - 647
See TRUSTEE RELIEF ACT.

13 & 14 Vict. c. 60, s. 3—*Trustee Act* - 707
See TRUSTEE ACT.

16 & 17 Vict. c. 51, s. 2—*Succession Duty* 351
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17 & 18 Vict. c. 36—*Bills of Sale* - 138
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38 & 39 Vict. c. 91, ss. 5, 10—*Trade Marks* 36,
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SUCCESSION DUTY—*English Settlement—English Settlor — English Trustees — Foreign Funds—Foreign Beneficiaries—Foreign Domicile—"Property"—Succession Duty Act*, 1853, *s.* 2.] The word "property" in sect. 2 of the *Succession Duty Act*, 1853, includes foreign moveable property—as, for instance, funds or shares of a foreign government or trading corporation—comprised in a British settlement, vested in trustees subject to British jurisdiction, and recoverable by action in a British Court.—The mere fact of a person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from payment of succession duty.—By an English settlement executed in *England* on the marriage, in 1838, of an English lady with a domiciled Italian, the lady assigned certain property belonging to her, consisting of French Rentes, shares in the *Bank of France*, and English government securities, to four trustees, of whom one was an Italian and the other three were English, upon trusts, after the death of the survivor of the husband and wife, for the children of the marriage. The settlement contained provisions usually inserted in English settlements, including a power for the trustees to reinvest in British or French securities. From the date of the marriage until their deaths the husband and wife resided in *Italy*. The Italian trustee having died, an English trustee was appointed in his place. The husband survived the wife and died in 1877, leaving two children, the only issue of the marriage, the several trust funds being then in the names of four English trustees. Both the children being domiciled Italians, the question arose whether, under the *Succession Duty Act*, 1853, duty was payable on their succession to their father in respect of the French Rentes and bank shares:—*Held*, that succession duty was payable, inasmuch as the settlement was a British settlement, the trustees or persons having the legal ownership were subject to British jurisdiction, and the forum deciding any claim by the children in respect of the trust funds was a British Court. *In re* CIGALA'S SETTLEMENT TRUSTS - - 351
SUCCESSOR—Power to name—Copyholds for life
See COPYHOLD. 2. [453
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TAXATION OF COSTS—Higher or lower scale
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TENANT IN TAIL—Equitable—Married woman—Mode of barring - - - 288
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TRADE—Use of house for purposes of—Covenant
See COVENANT. 3. [271
TRADE-MARK — *Registration — Single Letter — Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 1, 10—*Trade Marks Registration Amendment Act*, 1876 (39 & 40 *Vict. c.* 33), *s.* 1.] A single letter cannot be registered as a trade-mark under the Trade Marks Registration Acts. *In re* MITCHELL'S TRADE-MARK - - - 36
2. —— *Registration — Application to rectify Register—Laches—Costs—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 5.] On an application under sect. 5 of the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), to

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TRADE-MARK—*continued.*
remove from the register a trade-mark of *H. & Co.*, who had registered it as an old mark after advertisement in the *Trade Marks Journal*, claiming forty one years' user, it appeared that for the greater part of that time the mark had been a common mark, and for about six years had been so to the knowledge of *H. & Co.*, and that the applicants, who had long used the same trade-mark, were not aware of the advertisement, and had not opposed the registration:—*Held*, that the trade-mark must be ordered to be removed from the register; that there had been no laches on the part of the applicants, and that the Respondents must pay the costs. *In re* HYDE & Co.'s TRADE-MARK - - - - - - - - **724**

3. —— *Trade Name—Name of Place—Imitation—Fraud—Injunction—Evidence of Deception.*] The Plaintiff was the owner of and worked all the collieries in the parish of *R.* in *Somersetshire*, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her waggons and bill-heads the words "*R.* Collieries." The Defendants, from 1868, carried on at *R.* the business of coal merchants as the "*R. Coal Co.*," having depôts at various railway stations in the south and west of *England*, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of *R.*, but in a district or basin in which coal was raised similar to that raised within the parish, coal raised in the district, but outside the parish, being known in the market as *R.* coal. In 1873 the Defendants began to sell coals at *G.* in *Surrey*, by means of a local agent, and in 1875 they bought the good-will of a retail coal dealer named *C.* at *G.*, who had become bankrupt. They then advertised themselves in the *Surrey* newspapers, and otherwise in the neighbourhood, as "*The R. Colliery Proprietors and Factors, Coal and Coke Merchants* (late *C. & Co.*)," and offered to supply coal of every description direct from the collieries:—*Held*, that the Defendants were not entitled to use the name "*The R. Colliery Proprietors*," unless and until they should acquire a colliery within the parish of *R.*, or to use any style implying that their coal came from the parish of *R.*, unless and until they should become authorized to sell coals raised from a colliery within that parish:—*Held*, also, that, the acts of the Defendants being calculated to induce purchasers to believe that the Defendants were selling the Plaintiff's coal, it was not necessary for the Plaintiff to prove any instance of actual deception, or any actual damage. BRAHAM *v.* BEACHIM - **848**

4. —— *Trade Name—Name of Place—Fraud — Injunction — Collateral Misrepresentation by Plaintiff.*] The Plaintiff manufactured a fluid which he sold under the name of "*Aromatic Bitters*," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "*Angostura Bitters*," it having been originally manufactured at the town of *Angostura* in *Venezuela*. The name of this town was afterwards, by a decree of the state, changed to *Ciudad Bolivar*. After this change had taken place, the Defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "*Aromatic Bitters*," but, having been restrained in an English colony from using that name, he adopted the name "*Angostura Bitters*," and placed it upon the wrappers of his bottles, also registering his wrapper at *Stationers' Hall*. His wrappers were very similar to those of the Plaintiff, but they contained a statement that the fluid was prepared by the Defendant. After this the Plaintiff adopted the name "*Angostura Bitters*," and placed it upon his wrappers, and he brought an action against the Defendant, claiming an injunction to restrain him from imitating the Plaintiff's wrappers, and from using the name "*Angostura Bitters*." At the time when the action was brought the Plaintiff had ceased to carry on his manufacture at *Ciudad Bolivar*:—*Held*, upon the evidence, that the Defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "*Angostura Bitters*," in case he should ever discover the Plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the Plaintiff's.—It was alleged by the Defendant that the Plaintiff was disentitled to relief, because, at the time of the trial, he was using wrappers which contained a misrepresentation. The Plaintiff did not begin to use those wrappers until after the action had been brought:—*Held*, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the Plaintiff's title to relief. SIEGERT *v.* FINDLATER [801

5. —— *Trade Name—Expired Patent—New Substance.*] Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent. LINOLEUM MANUFACTURING COMPANY *v.* NAIRN - - **834**

TRADE NAME - - **801, 834, 848**
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TRADER—Bankruptcy - - **157, 635**
See BANKRUPTCY. 5, 7.

TRANSFER OF SHARES—Power of directors to refuse—Unlimited company - **591**
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TRIAL—Changing place of - - - **390**
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—— Non-appearance of Plaintiff - **56, 410**
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—— Notice of—Form of notice - - **877**
See PRACTICE. 22.

TRUST—Breach of—Liability of one trustee to his co-trustees - - - - **116**
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—— Power coupled with trust—Impossible condition - - - - 633
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—— Precatory - - - - 181
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TRUSTEE—*Breach of Trust—Liability of one Trustee—Insufficient Security—Sale in Absence of Cestuis que Trust.*] Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the Defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due from him to the Defendant. The other trustee filed a bill against the Defendant, alleging that the security was insufficient, and asking that the security might be realized, and that the Defendant might make good any deficiency:—*Held* (affirming the decision of *Fry*, J.), that the Plaintiff had no equity to make his co-trustee primarily liable; and that the Court would not direct a sale of the property in the absence of the *cestuis que trust*. BUTLER *v.* BUTLER - - C. A. 116

2. —— *Costs, Charges, and Expenses—Costs of Trustee defending Suit—Charges of Personal Fraud against Trustee.*] The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately, and at the hearing Lord *Romilly* dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—*Held* (reversing the decision of Lord *Romilly*, M.R.), that the trustee was entitled to be paid his costs out of the estate as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. WALTERS *v.* WOODBRIDGE C. A. 504

—— Devise to—Legal estate - - 657
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—— Discretion—Maintenance of child - 754
See INFANT. 1.

TRUSTEE ACT, 1850, *s.* 3—*Vesting Order—Trustee of Unsound Mind—Estate Tail—Form of Order.*] Where, by order under the *Trustee Act*, 1850, the estate of a trustee tenant in tail who is of unsound mind is vested in any person the order should only direct the land to be vested in such person for all the estate which the trustee could convey, if sane, and need not refer to the execution of a disentailing deed, or to the *Fines and Recoveries Act*. MASON *v.* MASON. *In re* MASON (A PERSON OF UNSOUND MIND) - C. A. 707

TRUSTEE RELIEF ACT, 1847 (10 & 11 *Vict.* c. 96)—*Practice—Payment out—Petition—Person not named in Trustee's Affidavit.*] A person not mentioned in the trustee's affidavit may apply by petition for the payment out of Court of moneys paid in under the *Trustee Relief Act*.—*Re Jephson* (1 L. T. (N.S.) 5) not followed. *In re* PUTTRELL'S TRUSTS - - - - - - 647

UNDISCHARGED DEBTOR—Costs - 161, 719
See BANKRUPTCY. 11, 14.

UNLIMITED COMPANY—Power of directors to refuse transfer - - - 591
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—— Winding-up - - - - 568
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UNREGISTERED BILL OF SALE—Administration - - - - 549, n.
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UNSOUND MIND—Person of—Trustee Act 707
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VACATION—Absence of Judge—Application to Appeal Judge - - - 732
See PRACTICE. 44.

VENDOR AND PURCHASER—*Misrepresentation—Compensation—Completion of Purchase—Execution of Conveyance.*] A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance.—*Bos* v. *Helsham* (Law Rep. 2 Ex. 72) considered. MANSON *v.* THACKER - 620

2. —— *Recitals in Deeds Twenty Years old—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict.* c. 78).] A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase-money, but the purchaser was not to be considered as accepting the vendor's title:—*Held*, that this clause had the same operation as the 35th section of the *Lands Clauses Act* (8 Vict. c. 18), and the purchaser was entitled upon depositing the purchase-money, not only to take possession, but to pull down the house, that being the object for which the purchase was effected.—Under the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required. BOLTON *v.* LONDON SCHOOL BOARD [766

3. —— *Rescission of Contract—Setting aside Sale of Land after Conveyance—Fraud—Misrepresentation—Copyhold Land sold as Freehold.*] A vendor sold land as freehold, received the purchase-money, and conveyed the land as freehold. Afterwards the purchaser, for the first time, discovered that the property was really copyhold. The vendor alleged that he made the representation believing it to be true:—*Held*, that, assuming that he had made the representation *bonâ fide*, the vendor had committed a legal fraud; that the sale must be set aside and the purchase-money repaid with interest; and that the vendor must

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VENDOR AND PURCHASER—*continued.*
pay all the expenses which the purchaser had incurred in consequence of the purchase. HART *v.* SWAINE - - - - - - **42**

4. —— *Specific Performance—Conditional Contract—"Subject to the approval of the Title by the Purchaser's Solicitor."*] A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor":—*Held*, that, in the absence of *mala fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title. HUDSON *v.* BUCK - - - - - **683**

—— Vendor a compounding debtor - **615**
See BANKRUPTCY. 2.

VESTING ORDER—Trustee Act - - **707**
See TRUSTEE ACT.

WASTE—Landlord and tenant—Reasonable use
See LANDLORD AND TENANT. 4. [**815**

WASTE OF MANOR—Right of pannage - **562**
See COMMON. 1.

WAY—*Obstruction—Erection of Building after Action brought—Mandatory Injunction—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2.] In an action for an injunction to restrain the erection of a building on a passage, over which the Plaintiff claimed a right of way, where he had, on being informed of the Defendant's intention, forthwith given him notice of his rights and commenced the action, and the Defendant had, notwithstanding, continued and completed the erection of the building complained of,—the Plaintiff's right having been established at the trial:—*Held*, that it was a case for a mandatory injunction and not for damages under *Lord Cairns' Act*. KREHL *v.* BURRELL - - - - - - **551**

WILL—*Construction—Ambiguity—Parol Evidence.*] A testator left a legacy to the children of his daughter by any husband other than Mr. *Thomas Fisher*, of *Bridge Street, Bath*.—There was a Mr. *Thomas Fisher*, of *Bridge Street, Bath*, who was a married man.—There was also a *Henry Tom Fisher*, son of the above, who sometimes lived with his father:—*Held*, that although Mr. *Thomas Fisher* answered the description, and his son's name was not *Thomas* but *Tom*, parol evidence of the above circumstances might be admitted to shew which was intended. *In re* WOLVERTON MORTGAGED ESTATES - - - - - **197**

2. —— *Construction—Ademption—Specific Legacy of Stock—Change of Investment.*] Bequest of "£1000 D Stock in the *London and North Western Railway Company*, now standing in the names of the trustees of my settlement, and bequeathed to me by my late wife (and which stock it is my intention to have transferred into my name), unto *A.*, *B.*, and *C.* upon trust for *A.*" The stock was never transferred into the testator's name, but was paid off by the company and reinvested, by his desire, in the purchase, in the names of the settlement trustees, of other securities:—*Held*, that the legacy was adeemed, and that the residuary legatees were entitled to the securities. *Le Grice* v. *Finch* (3 Mer. 50) and *Clark* v. *Browne* (2 Sm. & Giff. 524) disapproved. HARRISON *v.* JACKSON - - - - - - **339**

WILL—*continued.*

3. —— *Construction—Devise—Estate of Trustees—Legal or Equitable—Contingent Remainder—Provision for Maintenance.*] A testator devised lands to trustees, their heirs and assigns, to the use of *A.* for life, with remainder to the use of such child or children of *A.* as should attain twenty-one, as tenants in common in fee, with remainders over; and empowered the trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority. —*A.* died leaving four children, three adult and one an infant:—*Held*, that the contingent remainder of the infant child of *A.* was equitable, and did not fail by reason of the death of *A.* before the remainder vested. BERRY *v.* BERRY - **657**

4. —— *Construction—Executory Devise—Alteration of Devolution of Estate at Moment of Devolution only—Condition repugnant to prior Gift.*] A testator devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund and be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. And, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, and afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren and to their heirs and assigns, to be divided equally among them:—*Held*, that the four sons took the houses as tenants in common in fee, and that the executory devise over to their children was void.—The rules which regulate the validity of executory devises discussed. SHAW *v.* FORD - - - - - - **669**

5. —— *Construction—Next of Kin according to the Statute of Distributions—Time of ascertaining Class.*] A testator gave one fourth of a fund to one of his four daughters by name for life, and after her death to her children then living, but if she left no child, then he directed that the interest should be paid to his other daughters then living and the survivors and survivor of them, and after the decease of the last survivor he directed the same fourth share to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statutes for the Distribution of Intestates' Estates." He declared similar trusts of the other fourth shares respectively in favour of his other three daughters respectively and their respective children, with the same ultimate limi-

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WILL—*continued.*

tations. One daughter died after the testator, leaving children; the other three afterwards died without issue:—*Held*, by *Bacon*, V.C., that the class of next of kin was to be ascertained at the death of the last surviving daughter.—*Held*, on appeal, that the class was to be ascertained at the death of the testator: and that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters. MORTIMER *v.* SLATER - 322

6. —— *Construction—Original Gift—Issue of Child who might be dead "leaving Issue."*] Where there is a testamentary gift to such of a class as might be living at the death of a tenant for life, and the issue of such of them as might be then dead "leaving issue," the issue of such members of the class as die leaving any issue will take whether they survive their parent or not.—The *dictum* of *Kindersley*, V.C., in *Lanphier* v. *Buck* (2 Dr. & Sm. 499) on this point disapproved. *In re* SMITH'S TRUSTS - - - - 665

7. —— *Construction—Perpetuity—Period of ascertaining Class—Increase of Shares.*] Where there is a time fixed at which a fund is to be divided into separate shares, each share stands separate, and the gift of any share will take effect if the deposition of that particular share does not violate the rule against perpetuities, and will not be made void by the invalid gift of a portion of another share to the donee of the first-mentioned share. But where there is a gift to a class and the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is void.—A testatrix made a bequest in trust for such of her four nephews and nieces as should be living at the expiration of twelve months after the death of their mother, and the issue then living who should attain the age of twenty-one years, of any of the nephews and nieces who should have died before the expiration of the twelve months:—*Held*, on the construction of the will, that there was no period of distribution fixed except by the gift to the class; and *held*, that as the members of the class might not be ascertained until the expiration of more than twenty-one years from the death of the mother, the whole bequest failed. BENTINCK *v.* DUKE OF PORTLAND - - - 693

8. —— *Construction—Surviving Children—"Surviving" read "Other"—Settled and unsettled Shares—Children surviving by Stocks.*] A testator gave his residuary estate to trustees in trust for all his children equally, and directed that the shares of his sons should be paid to them at the age of twenty-five, and that the shares of daughters should be settled in trust for them for life for their separate use, and after their death in trust for the issue of such as should leave issue; and in case of the death of any of his sons before attaining twenty-five, or of any of his daughters without issue, or having issue, all such issue should die, being sons before twenty-five or daughters before twenty-one or marriage, the share or shares of him or them so dying should go in equal shares to the testator's "surviving children" in the same manner as the original shares.—The testator left three sons, all of whom attained twenty-five, and three daughters, all of whom married.—On the death without issue of one of the daughters whose share was to be distributed, one brother was still alive, and two brothers and two sisters were dead, and both of these sisters had left issue still living:—*Held*, by *Jessel*, M.R., that surviving children meant those who were surviving either personally, or, in the case of the daughters whose shares were settled, by their stocks; and that the surviving brother and the issue of the two deceased sisters were entitled to the fund.—But *held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that "surviving" meant "other," and that the fund was divisible in fifths among all the brothers and sisters of the deceased daughter. LUCENA *v.* LUCENA - - - C.A. 255

9. —— *Construction — Precatory Trust for "Children" — Execution of Trust — Power of Trustee to limit to "separate use."*] Where a precatory trust has been created by will in favour of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use. WILLIS *v.* KYMER - 181

10. —— *Construction—Rule in Shelley's Case—Deed and Will—Legal and Equitable Estate.*] The principles governing the application of the rule in *Shelley's Case* are the same in the case of wills as in the case of deeds.—Remarks on *Cooper* v. *Kynock* (Law Rep. 7 Ch. 398) and *Crofts* v. *Middleton* (2 K. & J. 194). *In re* WHITE AND HINDLE'S CONTRACT - - - - 201

11. —— *Construction—Wills Act* (1 *Vict. c.* 26), *s.* 24—*Will speaking from Death—Release of all Debts due to Testator.*] A testator, after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator:—By a codicil the testator released the son from another specified debt for moneys misappropriated by the son:—*Held* (reversing the decision of *Malins*, V.C.), that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by the testator between the date of his codicil and of his death. EVERETT *v.* EVERETT - C. A. 428

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